

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
POTOMAC SWIM AND RECREATION
ASSOCIATION**

Petitioner

Ted Sears

Steven Staudenmier

Kurosh Nasser

Alfred S. Blumberg

Eric Gary¹

For the Petitioner

Michele M. Rosenfeld, Esquire

Attorney for the Petitioner

Martin Klauber, Esquire, People's Counsel

Neither in Support Nor Opposition

Lois Williams, Catherine Stanhope and

Carlotta Wells

Community Participant in Support

West Montgomery County Citizens

Association, by George A. Barnes

Alurina Lloyd, Howard Diener,

Shirley Kahan, Leonard Kahan, Cheng Ku,

Elsbeth Backus, Jean Ku & Richard Backus

Community Participants in Opposition

Board of Appeals Case Nos. CBA-864-B
(OZAH Referral No. 09-06)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

¹ Mr. Gary was listed as a witness for Petitioner rather than as a community witness because he testified that he is on Petitioner's Board of Directors. Tr. 102.

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I. STATEMENT OF THE CASE

A. Procedural Background

On August 13, 2008, Petitioner Potomac Swim & Recreation Association, Inc., (the “Swim Club”)² filed an application with the Board of Appeals (Exhibit 1) seeking to modify an existing Special Exception (CBA-864-A, and earlier petitions) to permit additional structures and operations on the site of a Community Swimming Pool. Of the requested changes, it is the proposed seasonal tennis court cover (*i.e.*, a “tennis bubble”) that has raised the most significant opposition. The subject site is located at 10531 Oaklyn Drive (the intersection of Oaklyn Drive and Oaklyn Terrace, approximately 900 feet south of Falls Road,) in Potomac, Maryland, and it is zoned R-200. It is Parcel N317, Williamsburg Garden Subdivision, and is approximately 4.8 acres in size.

On September 19, 2008, the Board of Appeals issued a corrected notice scheduling the matter for a hearing before the Hearing Examiner on January 9, 2009. At the request of a member of the community, the hearing was postponed until March 6, 2009. Exhibits 25, 26, 27 and 30. Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), issued its report on December 8, 2008 (Exhibit 23), recommending denial of the proposed modifications on grounds that the planned size of the tennis bubble would be out of scale with, and clearly visible from, nearby homes.³ The Montgomery County Planning Board met on December 18, 2008, but split two-to-two on whether to approve the petition, and therefore issued no recommendation. Exhibit 24.

Letters both for (Exhibits 28⁴, 32, 35, 45, 52, 53, 67 and 68) and against (Exhibits 33, 34, 37, 38, 39, 40⁵, 41, 42, 46, 71, 73 and 74) this petition were received from the community. The West

² The Association is a non-profit, community-owned organization chartered under the laws of the State of Maryland.

³ The Technical Staff report is frequently quoted and paraphrased herein.

⁴ Exhibit 28 contains a letter from Petitioner’s counsel attaching 15 letters of support from the neighborhood; however 8 of them were unsigned. Signed versions were supplied in Exhibits 32 and 35.

⁵ Exhibit 40 attaches a petition in opposition signed by 46 neighbors (Exhibit 40(b)).

Montgomery County Citizen's Association is in opposition (Exhibit 37), and the Avenel Community Association took no position on the tennis bubble issue, but made suggestions regarding landscaping. Exhibit 72.

A public hearing was convened as scheduled on March 6, 2009, and Petitioner presented the testimony of five witnesses in support of the petition. Three witnesses from the community also testified in support. Nine witnesses from the community testified in opposition, including George A. Barnes, on behalf of the West Montgomery County Citizens Association (WMCCA). Martin Klauber, People's Counsel for Montgomery County, participated in the hearing and stated that he neither supported nor opposed the petition. Tr. 234-235. At the conclusion of the hearing, the record was held open to allow Petitioner time to submit modified plans and other materials. Petitioner did so on March 27, 2009. Exhibit 66. By Order dated March 18, 2009, the record was held open until April 30, 2009, to allow additional public commentary and Petitioner's response thereto. The record closed on April 30, 2009, as scheduled.

The core issue in this case is the compatibility of the proposed tennis bubble. As will appear more fully below, the Hearing Examiner agrees with Technical Staff's analysis and finds that the planned size and bulk of the tennis bubble would be incompatible with this residential neighborhood. The Hearing Examiner therefore recommends denial of that portion of the modification petition and approval of the rest.

B. The Scope of the Hearing

Zoning Code §59-G-1.3(c)(4) provides that the public hearing on modification applications must be limited to discussion of those aspects of the special exception use that are directly related to the proposed modifications, and if the total floor area will be expanded by more than 25% or 7,500 square feet, the Board may review "the underlying special exception," but only to a limited extent, as

specified in Zoning Ordinance §59-G-1.3(c)(4)(A). That section provides:

(A) After the close of the record of the proceedings, the Board must make a determination on the issues presented. The Board may reaffirm, amend, add to, delete or modify the existing terms and/or conditions of the special exception. The Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26, if (1) the proposed modification expands the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less, and (2) the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected. [Emphasis added.]

In the subject case, there is no question that the proposed changes represent an increase in the floor area⁶ “of all structures or buildings” by more than 25% or 7,500 square feet. Petitioner seeks to add two substantial structures to the site, a tennis bubble which would be in place about five months each year and a permanent, single-story, tennis office building. The bubble would cover an area of greater than 18,000 square feet and the tennis building would cover about 900 square feet, judging from their floor plans (Exhibits 6(m) and 6(c)). The existing bathhouse building, which is the only building currently on the site, appears to have about 3,000 square feet of floor space (given that it is 25 feet by 125 feet at its widest dimensions). Thus the expansion of floor area proposed far exceeds the statutory threshold of this section.

Nevertheless, Petitioner argues that this section does not apply to this case for three reasons (Exhibit 66(f), pp. 3-6):

1. Zoning Ordinance §59-G-1.26, which is referenced in §59-G-1.3(c)(4)(A), is, according to Petitioner, rendered inapplicable by the terms of the specific provision for community swimming pools, §59-G-2.56;
2. Section 59-G-1.3(c)(4) was adopted “long after the community swimming pool special exception was codified,” and, Petitioner argues, to apply it would nullify the effect of the language in §2.56; and

⁶ The definition of “floor area” in Zoning Ordinance §59-A-2, appears to apply to floor areas of buildings, not including the “floor areas” of other structures; however, §59-G-1.3(c)(4)(A) is very specific in including the floor areas of “all structures” as well as building in the calculation for this analysis. The question of whether the proposed tennis bubble would be a building or just a structure is addressed elsewhere in this report.

3. Even if §59-G-1.3(c)(4)(A) does apply, Petitioner argues that the proposed modifications would not change the nature and character of the special exception.

The Hearing Examiner finds these arguments unpersuasive.

Petitioner's first argument is that §59-G-2.56 makes §59-G-1.26 inapplicable to community swimming pool cases. But that is not what the §59-G-2.56 says.

The provision in §59-G-2.56 upon which Petitioner relies is its first sentence, which provides: *"The provisions of subsection 59-G-1.21(a) do not apply to this section."* Subsection 59-G-1.21(a) contains many of the general conditions usually applicable to special exception requests, and under the quoted sentence from §59-G-2.56, they do not apply to the community swimming pool special exception. Petitioner would like to read the quoted sentence as prohibiting the application of not just §59-G-1.21(a), but also §59-G-1.26. There is no basis for that argument because the nowhere in the quoted sentence from §59-G-2.56 is there a reference to §59-G-1.26.⁷ If the Council had intended community swimming pool special exceptions to be exempted from §59-G-1.26 it would have said so, but it was very specific in exempting only the requirements of 59-G-1.21(a).

Therefore, the Hearing Examiner rejects argument #1 above, and concludes that, although Section 59-G-1.21(a) general standards do not apply in this case, §59-G-1.21(b) (relating to building permits); §1.21(c) (relating to burden of proof); §1.22(a) (Additional Requirements); §1.23 (General Development Standards); and §1.26 (Exterior Appearance in a Residential Zone) do apply, as well as the specific standards under § 59-G-2.56 for Community Swimming Pools.⁸

Petitioner's second argument also fails. The fact that a particular provision of the Zoning

⁷ Petitioner's argument in its post-hearing memorandum (Exhibit 66(f)) is inconsistent with what it conceded at the hearing. Petitioner's counsel agreed at the hearing that the Hearing Examiner's reading was correct and that only §59-G-1.21(a) was exempted, "not the entirety of the 59-G-1.2." Tr. 13.

⁸ §1.24 (Neighborhood Need) does not apply because both the swimming pool and tennis courts were previously approved by the Board, so a neighborhood need for the use has been established; §1.25 (Community Need) does not apply to a community swimming pool special exception by its own terms.

Ordinance was enacted later than another provision does not prevent application of the later provision unless to do so would disturb some vested right of a property owner, such as an existing and lawful non-conforming structure. In the subject case, it is the property owner, not the County, which seeks a change in the special exception by adding new structures, so the question of non-conforming existing structures does not come into play. Moreover, as discussed with regard to Petitioner's first argument, applying §59-G-1.3(c)(4)(A) would not nullify the exemption contained in §59-G-2.56 because that exemption does not apply to §59-G-1.26.

Petitioner's third argument is that the proposed modifications would not change the nature and character of the special exception. As will appear more fully below, the Hearing Examiner agrees with regard to the proposed tennis office building, but disagrees with regard to the proposed tennis bubble. Based on the entire record, the Hearing Examiner concludes that the proposed tennis bubble, if allowed, would *"change[] the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected."* §59-G-1.3(c)(4)(A).

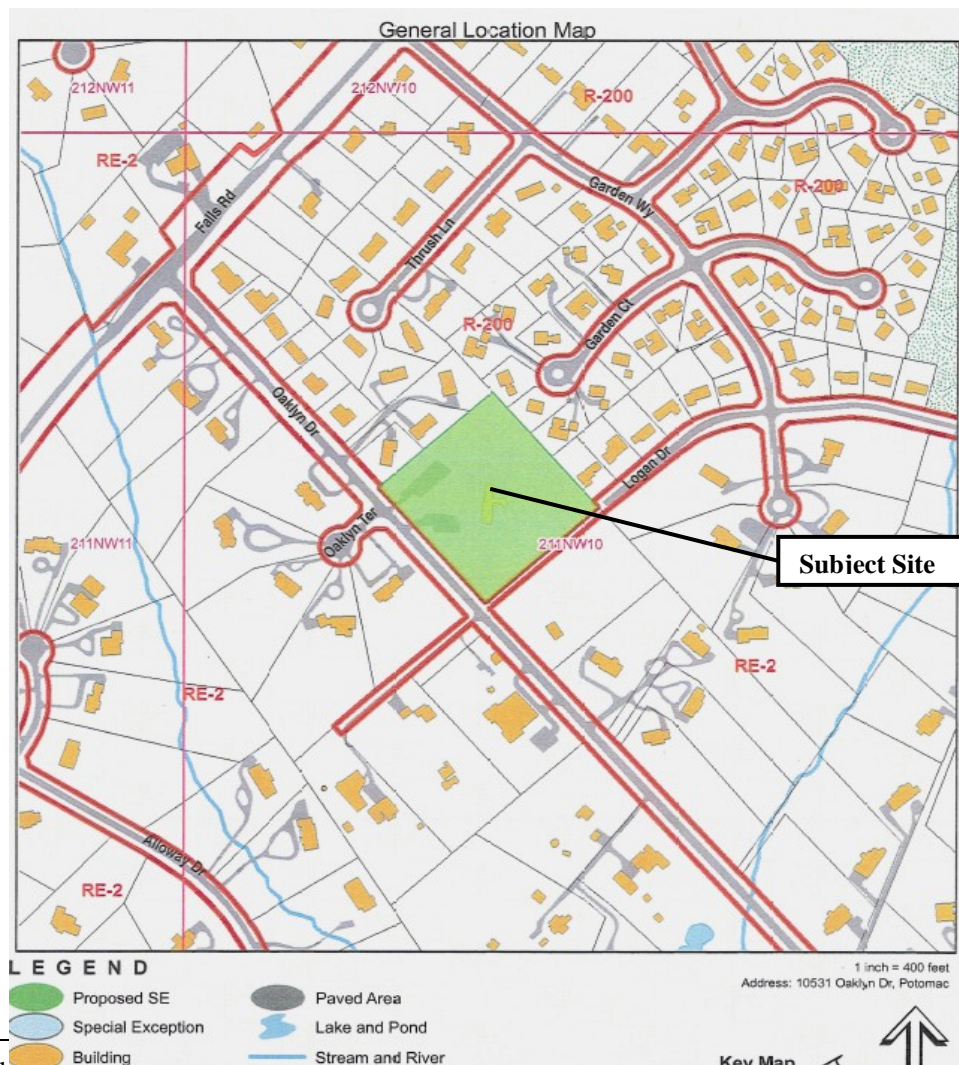
Given this analysis, the terms of §59-G-1.3(c)(4)(A) would permit the Board to *"require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26."* §59-G-1.3(c)(4)(A).

However, this conclusion is actually a "red herring" because the Board does not need to modify those aspects of the underlying special exception to resolve the subject case. It is the proposed tennis bubble and other requested modifications that the Board must evaluate, and it does not have to apply §59-G-1.3(c)(4)(A) to do so. The Board clearly has the power under the more general provision of §59-G-1.3(c)(4) to address *"the proposed modifications noted in the Board's notice of public hearing and . . . those aspects of the special exception use that are directly related to those proposals."* The remainder of this report will address the issues raised by the requested modifications.

II. FACTUAL BACKGROUND

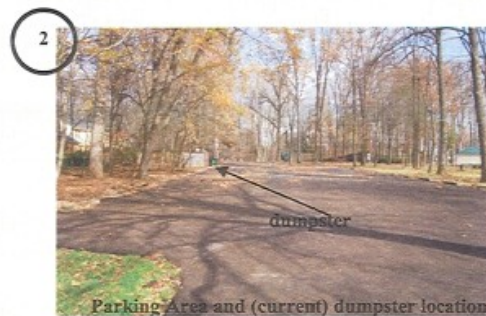
A. The Subject Property and Current Use

Potomac Swim & Recreation Association, Inc has operated a community swimming pool at the subject site for almost 50 years. The site, which is in a residential area of Potomac, is approximately 4.78 acres in size and has a frontage of 478 feet along Oaklyn Drive.⁹ The site is located at the intersection of Oaklyn Drive and Oaklyn Terrace, about 900 feet southeast of Falls Road, as seen on the following General Location Map, appended to the Technical Staff report (Exhibit 23) as Attachment 1:



⁹ Unrelated to this modification petition, the Association agreed to transfer a small segment of its property to an adjoining property owner at the request of that owner. On March 19, 2008, in CBA-864-4, the Board of Appeals approved that transfer and concurrently approved the Association's dedication of 1,031 square feet of land for public use, which the Association agreed to dedicate at the request of Technical Staff, in order to achieve a property boundary that Staff requested. Statement of Operations (Exhibit 3(a), p.3).

The site is in the R-200 Zone, and Technical Staff described it as primarily a wooded lot, with unusual grades that make each portion of the site's amenities "stepped." Exhibit 23, p. 3. The lot is generally at a higher elevation than Oaklyn Drive and is fronted by a large swale that runs along the length of the site. Some of these features can be seen in the following photos of the property contained in Attachment 3 to the Technical Staff report:





Oaklyn Drive (property frontage).
(Top): Generally looking east
(Bottom): Generally looking west.

Note: Property is generally higher than Oaklyn Drive, however, is flat from east to west of property's extents. The bubble would be in the area of the bottom picture.



Existing Tennis Courts.

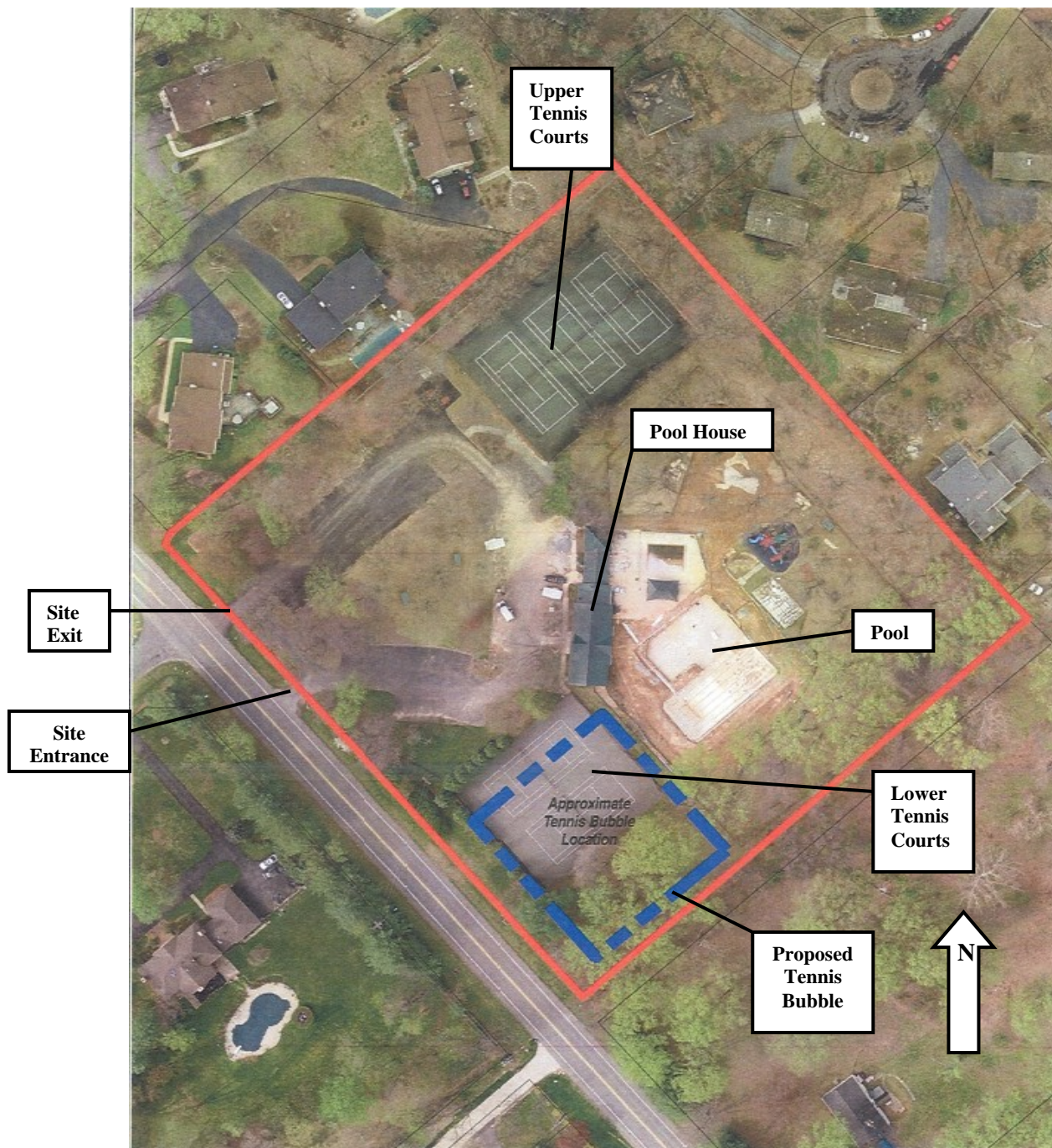
(Top): Generally looking east towards SF house
 (±192-ft from proposed courts and bubble)

(Bottom): SF house to the SW of tennis bubble.

Note: The area is heavily wooded; however, several trees will be removed and replaced by evergreens. The existing courts are to be removed and relocated 13-feet from the side yard setback. Currently, the courts are 80-feet from the side yard.



The property contains an existing pool and associated accessory uses, such as a pool house, bike racks, pavilions and picnic areas. Currently, there is no outdoor lighting on-site. This site also contains five tennis courts (three “upper” courts, located on the back of the site and two “lower” courts, adjacent to Oaklyn Drive). There are two access points to the site, one entrance and one exit (both onto Oaklyn Drive), and 73 parking spaces between them. The following aerial photo from Attachment 3 to Exhibit 23 shows these features and the location of the proposed tennis bubble:



This site has an approved Final Forest Conservation Plan (FCP), dated June 2, 2008. Exhibits 7(b)-(d). As described by Technical Staff (Exhibit 23, pp. 4-5), the approved FCP protects 0.23 acres of on-site tree cover in a Category I conservation easement and 0.93 acres of forest in an off-site mitigation bank. The modifications proposed would result in the removal of six large trees and one specimen tree; however, the FCP does not provide protection for these individual trees. Thus, the requested modification to the existing special exception would conform to the approved FCP.

The Board of Appeals granted the special exception for a 400 member community swimming pool in 1960 (BOA #864). Between 1962 and 1975, the Board of Appeals approved several modifications to add the existing five tennis courts, and a second pool. Table 1 from page 2 of the Technical Staff report (Exhibit 23) summarizes the history of the special exception.

Table 1. Special Exception History

Case No.	Year	Request
CBA 864	1960	Approved for a community swimming pool.
BA-1233	1962	Approved for 2 tennis courts for use of the members.
BA-2397	1968	Approved for a new swimming pool plus two additional tennis courts.
S-380	1975	Approved for one additional tennis court.
CBA 864-A	1992	Approved the extension of the existing covered pavilion and an addition to the existing storage/staff building.
CBA 864-A BA-1233 BA-2397 S-380	2006	(Administrative) Approved the renovation of the bath house, resurfacing and modification to shallow portion of main pool, shed, and the addition of picnic tables and benches.

Petitioner's Statement of Operations (Exhibit 3(a)) indicates that, for many years, the Association's membership has been significantly less than the 400-family membership cap that the Board approved in 1962.¹⁰ According to Petitioner, community pools, in general, have suffered a decline in membership because of the combined effects of (a) changing demographics (the population is aging) and (b) changing recreational habits (people are more likely to travel during the summer months and thus less likely to invest in a summer pool membership). Exhibit 3(a), p. 2.

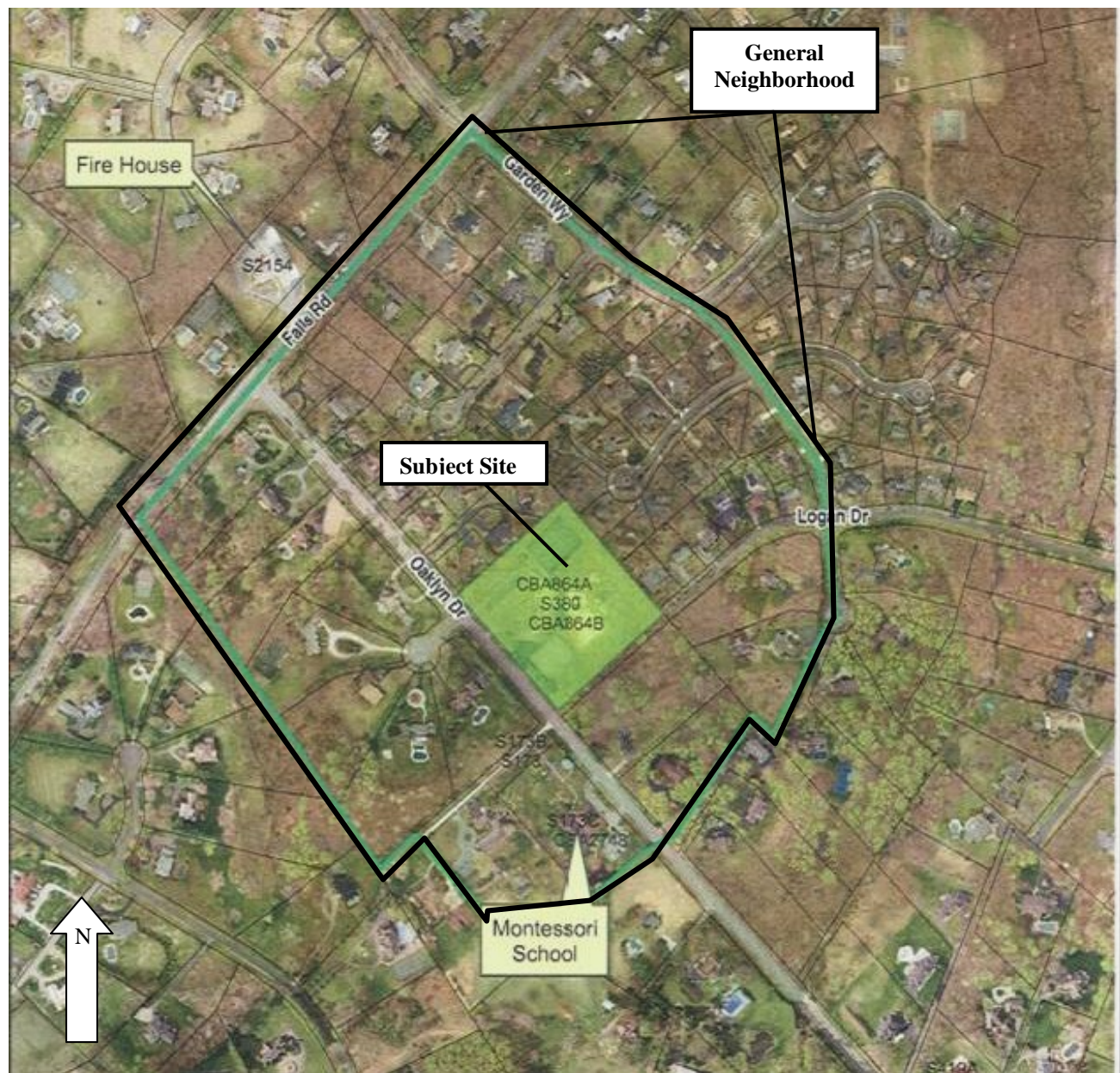
¹⁰ "Membership has been in a fairly steady decline from a high in 1999 of approximately 325 families." Exhibit 3(a), p. 2.

Technical Staff describes current operations, as follows (Exhibit 23, p.3):

The tennis program operates in the spring, summer and fall. The Swim Club employs two tennis professionals who provide instruction and training to members. The typical clinic includes approximately five players per court. Clinics for children may involve up to 7 children per court. Fall and spring clinics for children generally are conducted after school, between 4:00 P.M. and 7:00 P.M. Private lessons are also offered. The applicant states that the existing five tennis courts are at capacity during the summer months.

B. The Neighborhood

The general neighborhood was defined by Technical Staff in Attachment 4 to Staff's report:



Staff's definition results in the following neighborhood boundaries: Falls Road on the northwest; Garden Way on the northeast and east; and a line running about 500 feet from the subject site on the east, and about 700 feet from the subject site on the south and southwest. Petitioner's land planner, Alfred Blumberg, does not object to this definition (Tr. 175), and the Hearing Examiner accepts it as a valid boundary of those who would be most affected by the proposed modifications.

The surrounding area was described by Technical Staff as "a neighborhood of one-family detached homes." Exhibit 23, p. 10. Surrounding the site are many large-lot residential homes classified in the RE-2 and R-200 zones. Other special exceptions in the general vicinity include a Montessori School and an "a religious institution" which Staff did not identify. Exhibit 23, p. 4.

C. Proposed Modification

Petitioner Proposes:

- (1) Construction of a tennis court with hard court surface to be located adjacent to the two existing lower tennis courts, near to Oaklyn Drive.
- (2) Installation of a seasonal tennis cover (*i.e.*, the "tennis bubble") over the Oaklyn Drive courts (*i.e.*, the lower courts) to allow year-round play. The cover would be opaque and forest green in color, approximately 154 feet wide (fronting Oaklyn Drive) by 118 feet deep (18,172 square feet¹¹) and 35 feet high at its peak. It would be in place from October 25 through April 14th each year (*i.e.*, just under six months per year).
- (3) A generator, fan and heating unit located at the rear of the court cover and surrounded by a noise wall. Two propane fuel tanks will be buried nearby.
- (4) Two instructors and one assistant in the facility at any one time. A maximum of 12 players using the courts at any one time. There may be several members awaiting their scheduled court time or leaving the facility after play.
- (5) Construction of a single-story office building to be located adjacent to the lower courts and adjoining the existing bath house. This space will serve multiple functions

¹¹ As explained by Steven Staudenmier, the person who would install the cover, the tennis courts' containment fence is outside the cover, making the lower tennis court area about 18,600 square feet. Tr. 190.

(a) a place for members to check-in, (b) desk space for the tennis professionals, (c) storage space for tennis equipment, (d) toilet facilities and a shower for members.

(6) Installation of twelve non-glare, shielded lights on 20-foot poles at the Oaklyn Drive (lower) courts for use externally when the bubble is down. They would remain on until 10 p.m. between May 1 and September 30. When the bubble is up, the pole lights will be removed and the inside of the bubble will be lit by lights hanging from the ceiling. Five shielded lights on 8-foot poles (10-foot total height) would be added to the parking area for pedestrian safety. Seven additional wall-mounted lights are proposed for the new tennis building.

(7) A stationary outdoor exercise area.

(8) Relocation of the existing fenced dumpster, which is currently located adjoining residential properties, to a more central location.

Of these proposed changes, it is the proposed seasonal tennis cover (the bubble) that creates the most serious compatibility issues and arouses the strongest opposition in the neighborhood. The other compatibility issue relates to the proposed lighting, but that can be dealt with by an appropriate condition requiring lights out by 9:00 p.m. The compatibility problems with the proposed bubble are not so easily addressed.

1. Changes to Facilities:

The proposed changes to facilities are illustrated on the revised site plan, Exhibit 66(a).

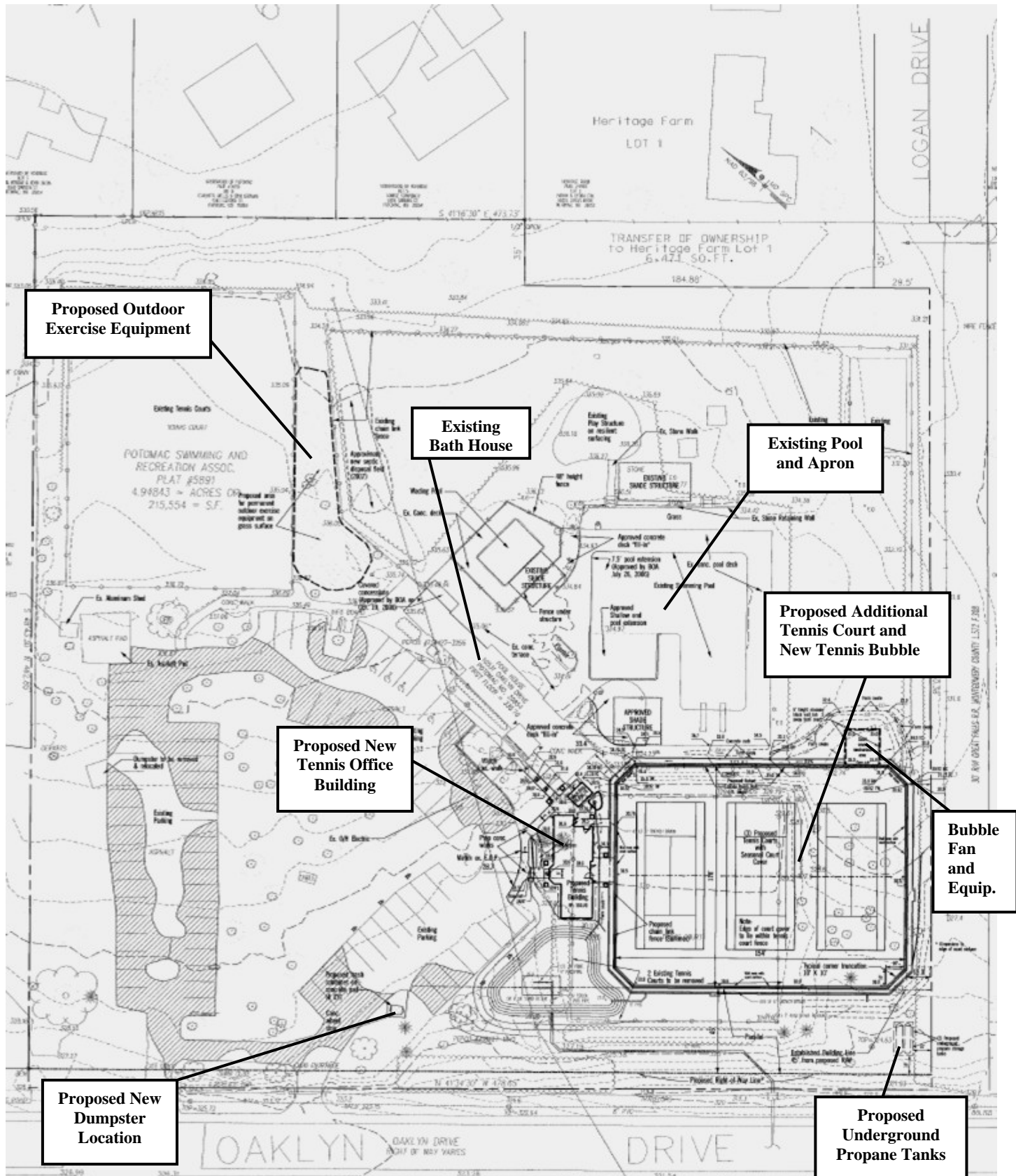
SITE DATA

1. Gross Tract Area: 4.78 Acres (after 0.17222 property transfer)
2. Zoning: R-200
3. Original Special Exception # CBA-1233, granted May 22, 1962 (and CBA-864A, CBA-2397, S-380)
4. Watershed: Rock Run (State Use I-P)
5. Area of 100 Year Floodplain: 0
6. This property is not within a Special Protection Area (S.P.A.).
7. This Application for the following:
 - a. Addition of 1 tennis court
 - b. Use of temporary (seasonal) tennis court cover
Note: Height of tennis court cover not to exceed 35 feet
 - c. Addition of tennis pavilion

Note: Proposed Oaklyn Drive right-of-way line location per survey plat prepared by Johnson - Bernat Associates, Inc., revised Sept. 13, 2006.

General Notes

1. Topography, boundary and on-site surface feature information indicated on this drawing from a survey by Johnson-Bernat & Assoc., Inc., Rockville, Md. Off-site data from M-NCPPC digital files - Tile #211NW10.
2. There are no hydric soils, no hydrophytic plants and no other evidence of non-tidal wetlands on or adjacent to the subject property.
3. There is no 100 Year Floodplain on or abutting the subject property. There are no streams or stream buffers on or abutting the subject property.
4. There is no evidence of historic resources on the subject property.



DEVELOPMENT STANDARDS - R-200 Zone

STANDARD	MIN. REQ'D / MAX. PERMITTED	PROPOSED / PROVIDED
Min. Tract Area	Not Specified	4.78 Acres
Min. Net Lot Area for a Main Building	20,000 sq.ft.	4.78 Acres (208,217 sq.ft.)
Min. Lot Width at Front Building Line	100 feet	478 feet
Min. Setbacks for a Main Building		
From Street R/W	45 feet for this property per calculated Established Building Line (by survey)	45 feet
From Side Lot Line	12 feet	175 feet
From Rear Lot Line	30 feet	165 feet
Min. Setbacks for an Accessory Building or Structure		
From Street R/W	65 feet	65 feet
From Side Lot Line	12 feet	12 feet
From Rear Lot Line	7 feet	39 feet
Maximum Building Height	50 feet	25 feet (permanent buildings) 35 feet (seasonal tennis dome)
Maximum Building Coverage (Including accessory bldgs.)	25%	1.8%

Parking Lot Tree Shade Per Sec. 59-E-2.83(d) - Montgomery County Zoning Ordinance

For a special exception use in a residential zone, a minimum of 30% of a parking facility must be shaded by tree canopy



PATTERN FOR TREE CANOPY SHADING
INDICATED ON PLAN

Area of parking lot pavement 25,506 sq.ft.

Area of tree canopy over parking pavement +/-14,000 sq.ft. *

Percentage of parking lot pavement
under tree canopy shade

55%

* Minimum canopy shade cover required 30% (7,652 sq.ft.)

SPECIFICATION SHEET FOR PARKING AREA LUMINAIRE

Kaleidoshade® Vaportite® Decorative Series

Space Age Shade



70 to 175 Watt (NA) Metal Halide
35 to 150 Watt (SJ) High Pressure Sodium
36 to 45 Watt (HP) Compact Fluorescent
100 and 200 Watt (R) Incandescent

Dimensions



APPLICATIONS

• Pedestrian, Street, or Highway, Road Cams, Airports
• Plaza, High, Retail Center, Stores, Athletic Clubs and
• Hospitals, Hotels, Airports, Stadiums, Amusement Parks

CONSTRUCTION

• Precision die cast aluminum enclosure
• Space aluminum decorative shade
• Heat and shock resistant, optically clear optical chamber
• With moisture resistant
• Corrosion resistant Durabond® White polyester powder
• Coated finish
• Optimal designed thermal insulation. See page 281.

ELECTRICAL

• All luminaires are over-voltage protected
• Enclosure is made of 100% die cast aluminum
• Compact Fluorescent ballasts are Electronic HPT
• 100W, 150W, 175W
• HPT ballast per IEEE C63.7-1995 (IEEE 1577)
• Optically clear glass lens, 1/2" thick, 1/2" x 1/2" x 1/2"

OPTICS

• Low glass clear polycarbonate glass lens standard
• Precision die cast aluminum enclosure
• Optically clear glass lens
• Precision die cast aluminum enclosure
• Precision die cast aluminum enclosure
• Precision die cast aluminum enclosure

MOUNTING

• Precision die cast aluminum enclosure
• Precision die cast aluminum enclosure
• Precision die cast aluminum enclosure
• Precision die cast aluminum enclosure

WARRANTY/TESTING

OPTIONAL ACCESSORIES - SEE PAGE 281

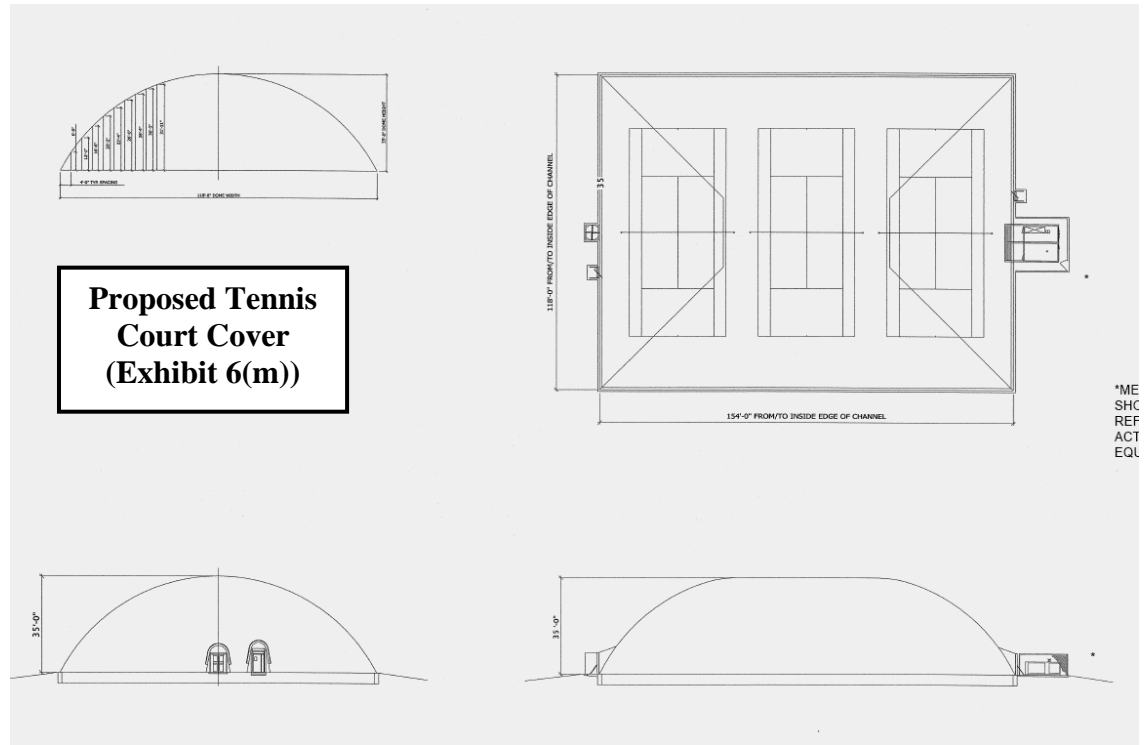
ORDERING GUIDE EXAMPLE: RSA100MALAGC-E

RSA	100	MA	L	AG	C	E
RSA	32	HF	C	C	C	L

Part No.	Wattage	Source	Lamp	Shade	Coat	Options
RSA100MALAGC-E	100W	MA	L	AG	C	E
RSA32HFCC-E	32W	HF	C	C	C	L

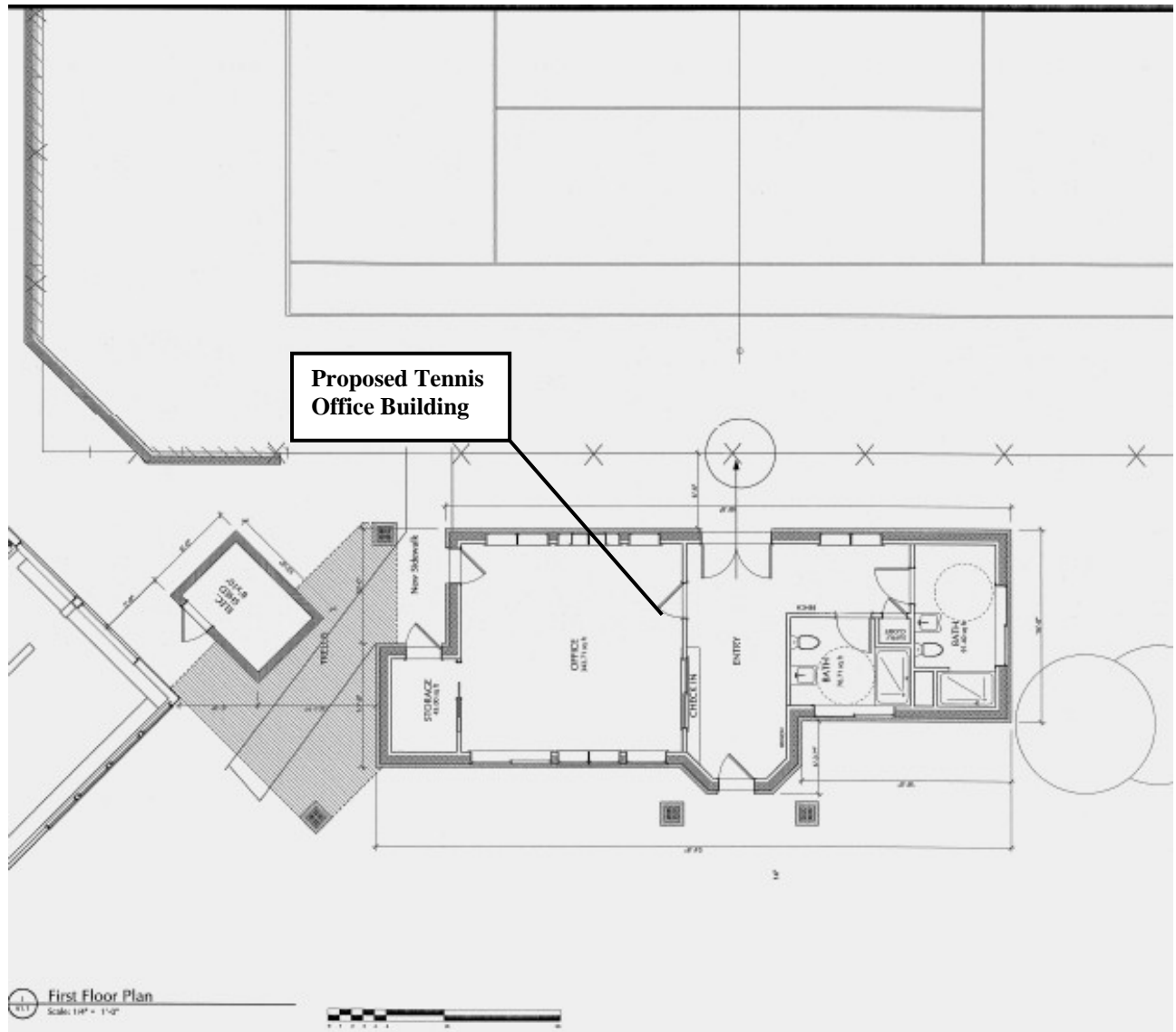
Product information is subject to change without notice.
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The proposed structures can be more easily seen on elevations supplied by Petitioner:



Proposed Tennis Office Building (Exhibit 6(b))

The Floor Plan for the proposed tennis office building (Exhibit 6(c)), is depicted below the adjacent tennis court:



2. Buildings v. Structures, and the Resulting Setbacks:

The determination of what setbacks apply in this case depends upon whether the proposed tennis bubble would be a building or just a structure under the Zoning Ordinance. Zoning Ordinance §59-2.56(a) requires additional setbacks from “[t]he swimming pool, including the apron and any

buildings . . .” They “must not be any closer than 75 feet from the nearest property line nor closer than 125 feet from any existing single-family or two-family dwelling . . .”¹² The proposed tennis office building would meet those additional setback requirements because it would be located about 80 feet from the nearest property line and more than 125 feet from the nearest dwelling. However, the proposed location of the tennis bubble would not permit compliance with those setbacks, if it were deemed a building, since it will be set back only 12 feet from the southeastern (side) property line and only 45 feet from the front property line. While it is undisputed that the proposed tennis office building is a building, there is a question as to whether the proposed tennis bubble is a building, or just a structure.

Under the Zoning Ordinance’s definitions, a building is one type of structure, but not all structures are buildings. Zoning Ordinance §59-A-2 defines a structure, as follows:

Structure: *An assembly of materials forming a construction for occupancy or use including, among others, buildings, stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio and television broadcasting towers, telecommunications facilities, water tanks, trestles, piers, wharves, open sheds, coal bins, shelters, fences, walls, signs, power line towers, pipelines, railroad tracks and poles. [Emphasis added.]*

A building is defined as:

Building: *A structure having one or more stories and a roof, designed primarily for the shelter, support or enclosure of persons, animals or property of any kind.*

Petitioner argues that the proposed, air supported, tennis bubble is a structure, but not a building, because it is temporary in nature and does not have a roof and walls, as those terms are commonly understood. Exhibit 66(f), pp. 1-3. The Department of Permitting Services (DPS) agreed with Petitioner, signing off on a letter from their attorneys asserting that temporary tennis bubbles are not buildings. Attachment 8 to the Technical Staff report (Exhibit 23).

¹² The pool itself also must be “not less than 25 feet” from a railroad right-of-way. The Hearing Examiner does not apply the railroad setback provision because the pool is not being relocated.

It is a maxim of statutory construction that an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight. As stated in *Watkins v. Secretary, Dept. of Public Safety and Correctional Services*, 377 Md. 34, 46, 831 A.2d 1079, 1086 (2003), “We must respect the expertise of the agency and accord deference to its interpretation of a statute that it administers.”

Thus, DPS’s interpretation of the Zoning Ordinance must be given considerable weight. Although the Zoning Ordinance’s definition of “building” does not mention permanency, the concept of permanency does appear to be inherent in the generally accepted definitions of buildings. Merriam Webster’s Collegiate Dictionary defines a building as “a usually roofed and walled structure built for permanent use (as for a dwelling).” Webster’s Third New International Dictionary (Unabridged) defines a building (in relevant part) as “a constructed edifice designed to stand more or less permanently . . .” Moreover, it is not entirely clear that the air-supported bubble consists of walls and a roof, in the commonly accepted parlance. Based on DPS’s interpretation of the term “building” and the dictionary definitions, the Hearing Examiner concludes that the proposed tennis bubble would be a structure, but not a building, under the Zoning Ordinance. Therefore, the additional setbacks required by §59-2.56(a) for buildings do not apply to the proposed tennis bubble. They do apply to the proposed tennis office building, but it will conform to those standards.

Mr. Barnes suggested in his testimony on behalf of the WMCCA that DPS was wrong in deciding not to apply the §2.56(a) setbacks to the proposed bubble because, for six months a year, it would be inflated and will have the bulk of a large building. Moreover, “the expanded courts will have a permanent footprint and will surely require some form of wall or seal to which the bubble will be anchored.” Tr. 237. These observations, while true, beg the question. The question regarding application of the §2.56(a) setbacks is whether the tennis bubble is a “building,” not whether it will be

a very large structure with a permanent footprint. Section 2.56(a) applies its setbacks only to the pool, its apron and “buildings,” not to other structures, no matter how permanent or bulky. Whether or not the Council was wise in not making other structures subject to this setback scheme is not for the Hearing Examiner to judge.

3. Are tennis courts permitted in conjunction with a Community Swimming Pool?

Community swimming pools are defined in Zoning Ordinance §59-A-2:

Swimming pool, community: *A swimming pool or wading pool, including buildings necessary or incidental thereto, operated by members of more than 10 families for the benefit of such group and not open to the general public, whether incorporated or unincorporated, whether organized as a club or cooperative or association; provided, that it is not organized for profit and that the right to use such pool is restricted to such families and their guests.*

Neither the definition quoted above, nor the language in Zoning Ordinance §59-2.56 makes any reference to tennis courts or other activities unrelated to swimming. There is thus a question of whether tennis courts are permitted by the Zoning Ordinance in a community swimming pool special exception. Fortunately, the Hearing Examiner need not decide whether the tennis courts are permitted on this site for this special exception because the Board of Appeals has already decided to permit them as part of this special exception, as outlined in the table from the Technical Staff report reproduced on page 12 of this report.









The doctrine of “administrative law of the case” precludes re-examination in a later proceeding of issues earlier decided in the same case by an administrative body acting in a quasi-judicial capacity, absent good cause (*e.g.*, fraud, surprise, mistake, inadvertence or a new or different factual situation). *See, Schultze v. Montgomery County Planning Board*, 230 Md. 76, 185 A.2d 502 (1962) and *Woodlawn Area Citizens Assoc. v. Board of County Comm'rs*, 241 Md. 187, 194-197, 216 A.2d 149 (1966). The Hearing Examiner finds that the addition of one more tennis court does not invite a re-examination of the underlying issue of whether tennis courts are permissible in this type of special

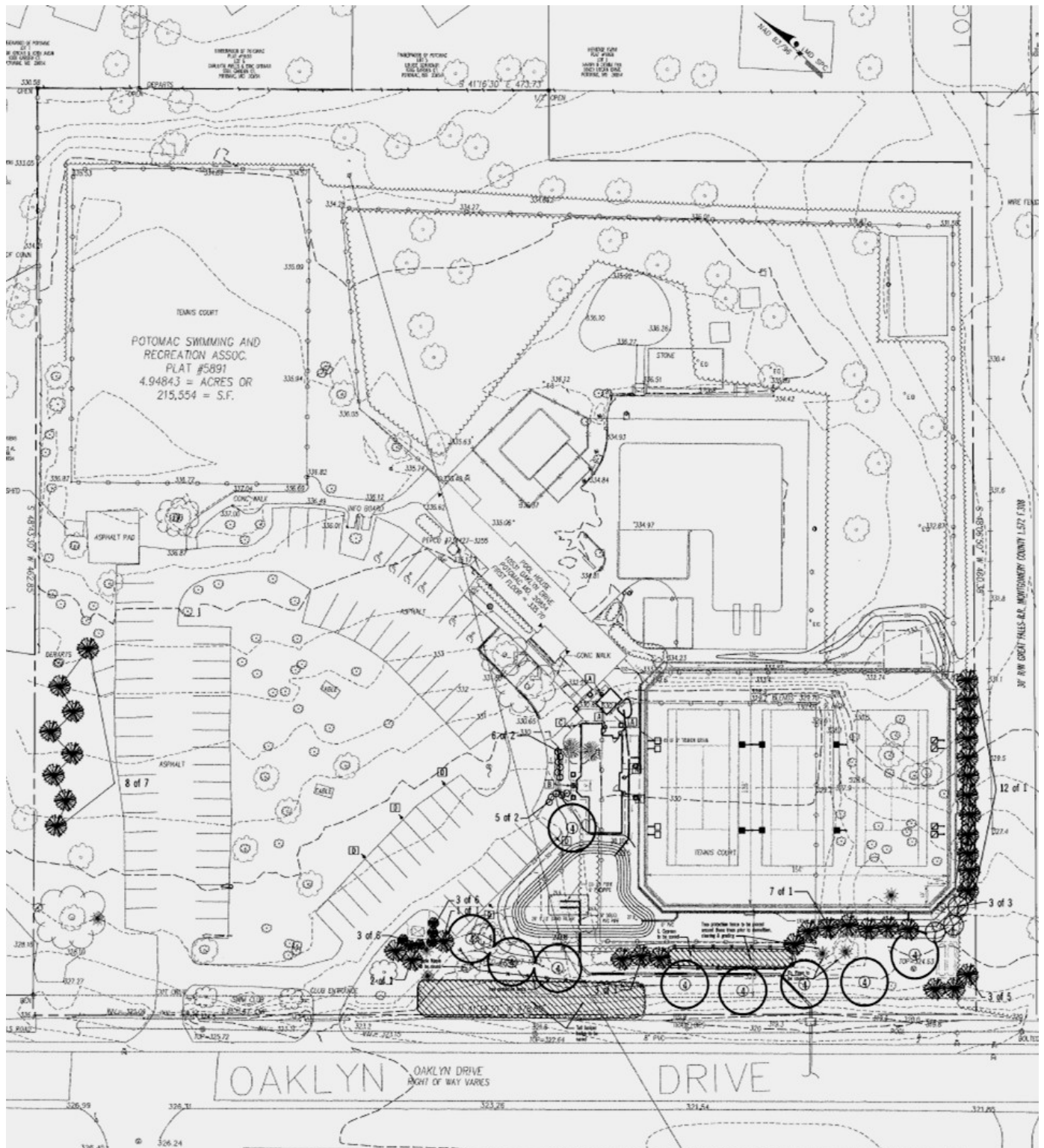
exception under the case-law standards set forth above. Therefore, the Hearing Examiner concludes that the proposed new tennis court is not precluded by the Zoning Ordinance in this case. Moreover, Petitioner produced a list of 10 other community swimming pool special exceptions approved by the Board of Appeals, and six of them permitted tennis courts (Exhibit 66(j)), so the allowance of tennis courts in conjunction with this kind of special exception appears to be a continuing practice of the Board.

4. Landscaping and Lighting:

The final Landscape and Site Lighting Plan (Exhibit 56) is reproduced below:

SITE LIGHTING KEY

SYMBOL	QUANTITY	TYPE	SPECIFICATION
	5	Exterior flat wall mount	Manufacturer: Lightolier Series: Arco Type: 11" dia., round, surface mount Lamp: (2) 9W
	1	Exterior flat ceiling mount	Manufacturer: Lightolier Series: Decorative Discus Type: 18" dia., round, surface mount Lamp: (1) 38W
	1	Exterior wall mount double flood	Generic flood light, not to exceed 100W incandescent
	5	Post lights in Parking area	Manufacturer: ExcelLine by Genlyte Series: Kaleidoshade, Space Age Shade Lamp: 32W Compact fluorescent Optics: Low glare prismatic glass globe Pole: 8 foot height (set on 2' conc. base, 10 ft. total height)
	2	Tennis Court - Type AC Single Tenon / One Luminaire	Manufacturer: Ruud Lighting Series: AC2-16, Model #AC2640-M, AC8640-M, AC3640-M Lamp: 400W Pulse Start Metal Halide Optics: Full Cutoff Pole: 20' height
	2	Tennis Court - Type AC Double Tenon / Two Luminaires	
	4	Tennis Court - Type AC8 Single Tenon / One Luminaire	
	4	Tennis Court - Type AC3 Single Tenon / One Luminaire Tilted 12°	



PLANT LIST

KEY #	BOTANICAL NAME	COMMON NAME	SIZE*	QUANTITY	REMARKS
1	<i>Cupressocyparis leylandii</i>	Leyland Cypress	5' - 6' ht.	25	B & B, Full & tightly branched, strong central leaders
2	<i>Juniperus chinensis</i> 'Sea Green'	Sea Green Juniper	2.5' - 3' ht. & spd.	11	B & B or container, full plants
3	<i>Picea glauca</i>	White Spruce	7' - 8' ht.	3	B & B, full & tightly sheared, symmetrical branching
4	<i>Quercus palustris</i>	Pin Oak	3.5" - 4" cal. / 18' - 20' ht.	9	B & B, well branched, full heads
5	<i>Pinus strobus</i>	White Pine	7' - 8' ht.	3	B & B, full & tightly sheared, symmetrical branching
6	<i>Thuja occidentalis</i> 'Nigra'	Dark Green American Arborvitae	5' - 6' ht.	6	B & B only, sturdy central leaders
7	<i>Ilex opaca</i>	American Holly	7' - 8' ht.	8	B & B, full & tightly sheared, symmetrical branching

Petitioner proposes to improve the landscaping in a variety of ways. Mr. Blumberg described the landscaping (Tr. 154-158) as a combination of Leyland cypresses right in front of the existing tennis courts and other evergreen non-deciduous plant materials in a very deep and high hedgerow along and parallel to Oaklyn Drive, just to the east of the eastern entranceway. As a result of the discussion at the Planning Board, Petitioner proposes to add eight, seven-to-eight foot tall, American Hollies zigzagged along the western property line adjacent to the Diener residence and the Backus residence to provide additional screening.¹³ Also, along the eastern side of the tennis court, adjacent to the easternmost property, Petitioner now proposes to plant additional Leyland cypress, which are a fast growing evergreen and thick material. They would be five to six feet in height when planted and will take eight to ten years to grow to 35 feet. Thus, they will not provide screening for most of the bubble for quite a long time. Existing vegetation at the southeast corner of the courts would also be supplemented with additional Leyland cypress. There are some existing deciduous trees, and Petitioner is going to supplement those with nine Pin Oaks adjacent to Oaklyn Drive, from the southwest corner up to the entrance driveway. The Pin Oaks will be 18 to 20 feet in height at the time of planting. Petitioner intends for these to create a screen for the tennis courts, the lights and the tennis bubble. The relocated dumpster would be landscaped with evergreens around the three sides that face Oaklyn Drive.

Technical Staff noted that the rapidly growing Leyland Cypress are “prone to disease and toppling over in very wet seasons.” Exhibit 23, p. 10. The “Vision Division” of Technical Staff opined that the proposed landscaping “would not sufficiently mitigate the effects of such a large monolithic structure.” Exhibit 23, Attachment 5, p. 2. Petitioner argues that the trees it added to the Landscape Plan following Technical Staff’s analysis will suffice.

¹³ Elsbeth Backus, a neighbor, testified (Tr. 256-261) that in her opinion the hollies would not grow in the shade of the other trees. Petitioner’s land planner refuted this claim, stating that “they will, in fact, grow and grow well in that shaded environment.” Tr. 282.

The Hearing Examiner finds that the additional landscaping will certainly help, but it will not solve the fundamental problem – the proposed tennis bubble is too big and bulky for this residential neighborhood, and by Petitioner’s own admission (Blumberg testimony, Tr. 156-157), it will continue to be visible, despite the additional plantings, for many years. These compatibility issues will be discussed in Part II. D. of this report.

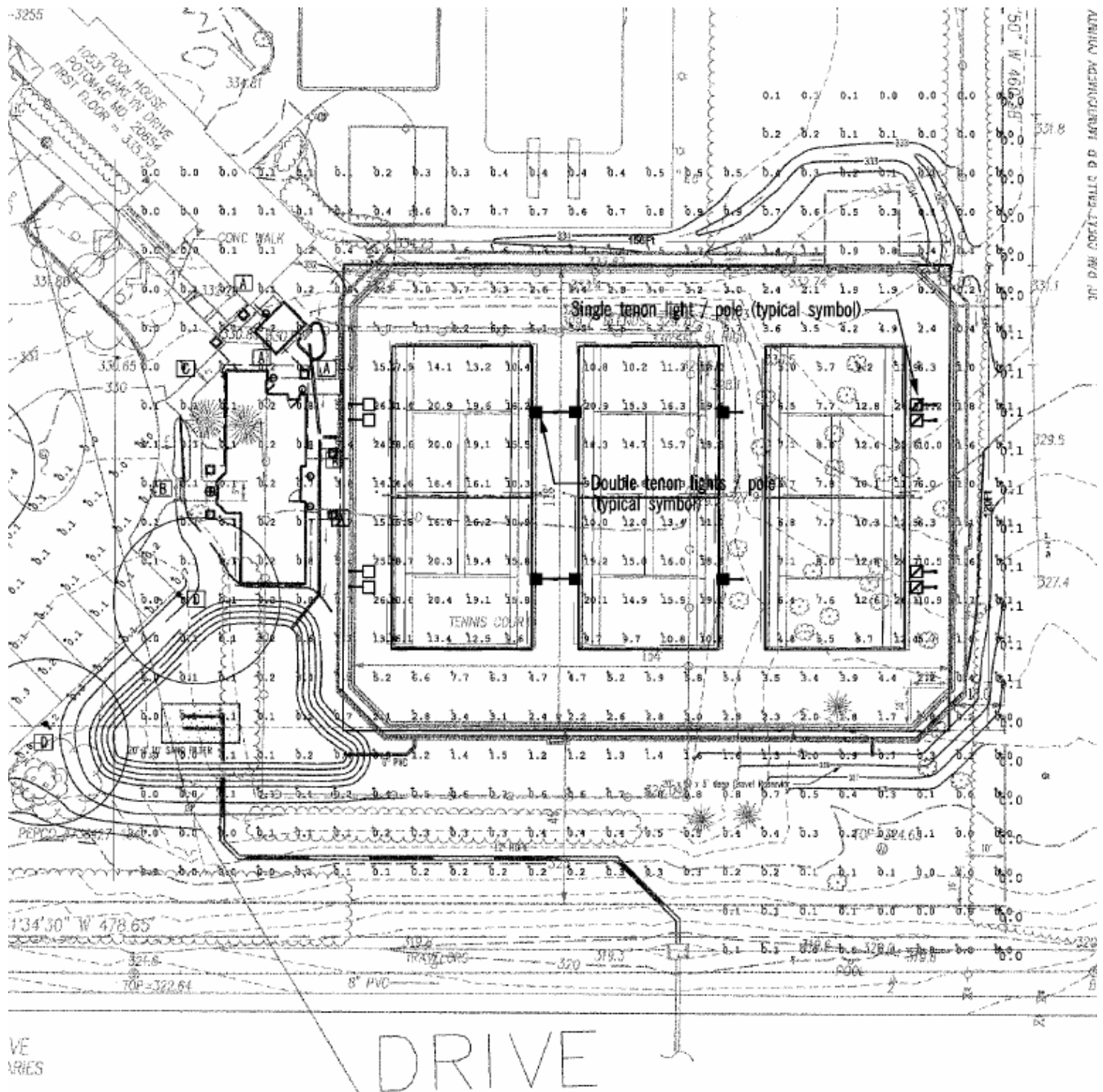
As specified on the landscape and lighting plan (Exhibit 56) reproduced above, there will be a variety of lights added to the site. Currently, there are no external lights on the subject site. Petitioner plans to erect twelve lights on 20-foot poles that will illuminate the lower tennis courts when the bubble is down. These will be removed during the winter play, when the tennis bubble is inflated. Lights will hang from the interior bubble and no light will be emitted, since the bubble would be made from opaque materials. Exhibit 23, p. 8.

Because Petitioner’s plan contemplates evening tennis play through use of the bubble in winter and tennis lights during the rest of the year, lighting in the parking lot becomes a safety issue. Because people will park closest to the entrance to the new tennis building, five new lights on 8-foot posts (reaching a total height of 10 feet) would be located in the parking area closest to the tennis building. There will also be seven wall-mounted lights on the new tennis office building.¹⁴

Since the proposed tennis bubble would be opaque, the lighting inside is not, in itself, an issue when the bubble is up for about six months a year. However, when the bubble is down, the tennis lighting may be visible, if not intrusive, and the whole project will certainly extend the period of activity at the club during the entire year by providing indoor lighting when the bubble is up and outdoor lighting when it is down. The photometric study for the proposed lighting is reproduced

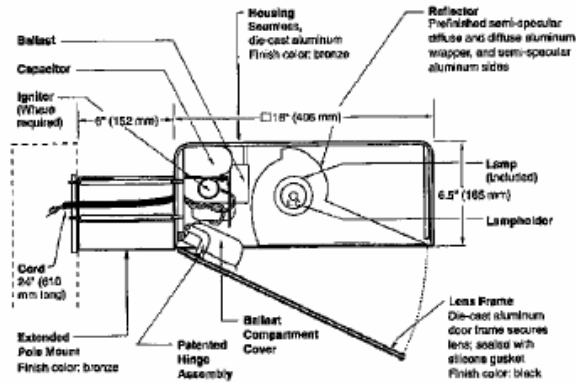
¹⁴ Petitioner’s land planner, Al Blumberg, failed to mention the lights on the proposed tennis building in his testimony, but they are clearly indicated on Petitioner’s plans. Tr. 163.

below (Exhibit 48):¹⁵



¹⁵ Exhibit 49, which is not reproduced here indicates that light will not escape from the tennis bubble when erected.

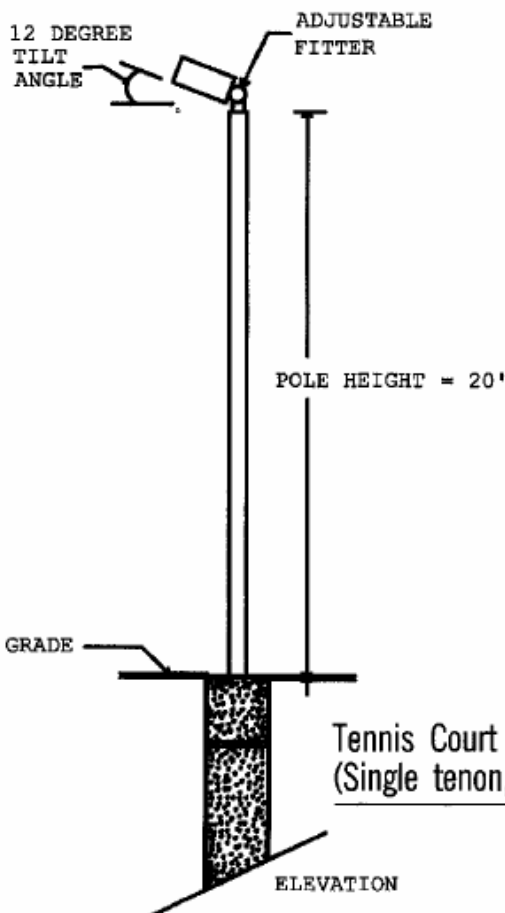
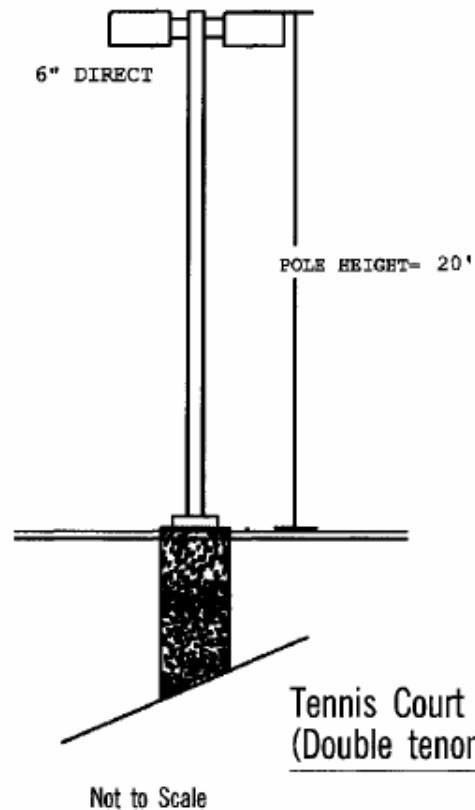
6" EXTENDED POLE MOUNT

16" (406 mm) AREA CUTOFF LIGHTAC2-16
SERIES

Notes

Tennis Court Light Specification

Ruud Lighting

"AC3640-M"Tennis Court Light Elevation
(Single tenon, 12° Tilt)**AC2640-M
FULL CUT OFF**Tennis Court Light Elevation
(Double tenon)

Not to Scale

Lighting in residential zones is governed by Zoning Ordinance §59-G-1.23(h), which provides:

(h) Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

(1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.

(2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.

It appears from this photometric study that lighting at the side and rear property lines will not exceed the statutory maximum, as Technical Staff observed in its report (Exhibit 23, p. 8):

Although light poles are not desirable in a residential neighborhood, given the nature of the use and the appropriate screening, it does not adversely affect the residential character of the neighborhood. Lighting at the property lines does not exceed 0.1 foot-candles.

The objections to this lighting will be discussed in Part II. D. of this report.

5. Changes to Staffing:

According Petitioner's Statement of Operations (Exhibit 3(a), pp. 10-11), the Petitioner now operates its pool facilities through a pool management company under contract to the Association. It provides seasonal staffing for the pool and bathhouse. Petitioner also has an existing tennis program that operates during the spring, summer and fall seasons, with two tennis professionals under contract to the Association. Petitioner plans to extend its existing tennis program through the winter months under the court cover, if the requested modifications are approved, using the same two professionals. If the court cover is approved, Petitioner also will hire, on a seasonal basis, two assistants who will work by assisting in the office and on the courts as necessary while the facility is open. While these two seasonal positions would be new, Petitioner states that these individuals would only be on the

premises when the swim facilities are closed, and they therefore would have a negligible operational impact.

If the Board agrees with the recommendation of Technical Staff and the Hearing Examiner, the tennis bubble will not be approved, and therefore no additional staff will be needed.

6. Hours of Operation:

Petitioner's Statement of Operations (Exhibit 3(a), pp. 11-12), indicates that Petitioner's swim facilities are ordinarily open daily between Memorial Day and as late as the latter part of September (weather permitting). General hours of operation for the swim facilities are 6:30 a.m. – 9:00 p.m. The tennis facilities are open year-round for play, weather and light permitting.

If the tennis bubble is approved, Petitioner “intends to open at 6:30 a.m. and close at 11:00 p.m.” When the Oaklyn Courts are uncovered, Petitioner “proposes to open at sunrise and remain open until dusk in the months of April and October, and open at dusk and close at 10:00 p.m. between May 1 and September 30 when the Oaklyn Courts are proposed to be lit.” Association members would be able to turn on the lights with a key, and the lights will be automatically turned off at 10:00 p.m. by an automatic timer.

The problems with these late hours of operation will be discussed in Part II. D. of this report, and the Hearing Examiner recommends that all lights be automatically turned off at 9:00 p.m., at which time all club activity should cease.

7. Membership:

Petitioner does not seek to increase its membership by this petition. Statement of Operations (Exhibit 3(a), p. 10.). Its membership is limited to 400 families, and according to Ted Sears, the President of the Board of Directors for the Potomac Swim and Recreation Association, the 400

membership cap includes anyone who is a member, whether permanent or temporary. Tr. 127. He also confirmed that the use of this facility would be for members only. Tr. 283.

8. Impact on Traffic if the Modification Petition is Granted:

Because there will be no increase in membership under this petition, and the additional tennis activity will not increase weekday, peak-hour traffic, by 30 trips, Technical Staff determined that there is no need for a traffic study, and the modification petition is not subject to Local Area Transportation Review (LATR) or Policy Area Mobility Review (PAMR). Staff also noted that there will be no change in the existing access points and the internal traffic circulation. Exhibit 23, p. 4.

The Hearing Examiner agrees that there are no traffic issues created by the proposed modifications, but there are some off-site parking issues discussed in Part II. D. of this report.

9. Environment:

As mentioned in Part II.A. of this report, this site has an approved Final Forest Conservation Plan (FCP), dated June 2, 2008. Exhibits 7(b)-(d). As described by Technical Staff (Exhibit 23, pp. 4-5), the approved FCP protects 0.23 acres of on-site tree cover in a Category I conservation easement and 0.93 acres of forest in an off-site mitigation bank. The modifications proposed would result in the removal of six large trees and one specimen tree; however, the FCP does not provide protection for these individual trees. Thus, the requested modification to the existing special exception would conform to the approved FCP.

According to Mr. Blumberg, Petitioner was required by the Department of Permitting Services to provide some stormwater management for the new structures only. Petitioner did not need to go back and retrofit the entire property, but the new structure and development, including the building, will be accommodated in a stormwater management sand filter area in the southeast corner of the site.

Mr. Blumberg testified that the stormwater management concept plan (Exhibit 9) has been approved by Department of Permitting Services. Tr. 153, 170.

No other environmental issues have been raised by this modification petition, and the Hearing Examiner finds that the environmental matters mentioned above have been appropriately addressed.

D. The Concerns of the Neighbors, Especially Compatibility

As mentioned at the beginning of this report, although some neighbors support the modification petition, significant concerns were raised by many other neighbors. The testimony, both pro and con, is summarized in Part III of this report. The concerns raised by the opposition neighbors are listed and discussed below:

1. Tennis Bubble size and bulk, closeness to the property lines, impact on property values
2. Outside Lighting for the Tennis Courts
3. Noise from equipment to keep bubble inflated
4. Possible hazard from buried propane tanks at property line
5. Use by non-members in a commercial operation
6. Loud swim meets involving non-members
7. Traffic and parking problems from special events
8. Trash issues

1. Tennis Bubble Compatibility:

The central issue in this case is the compatibility of the proposed tennis bubble. While some neighbors also mentioned this concern in connection with fears about the possible impact on their property values, they presented no expert evidence establishing that their property values would be adversely affected. Moreover, questions relating to property values are based on the general conditions listed in Zoning Ordinance §59-G-1.21(a), which are made expressly inapplicable by

Zoning Ordinance §59-G-2.56. Therefore, the Hearing Examiner's analysis is based on compatibility concerns, not property value issues.¹⁶

Compatibility is a legitimate issue in this case without reference to the general conditions listed in Zoning Ordinance §59-G-1.21(a) because it is required by Zoning Ordinance §59-G-1.23(g) and §59-G-1.26, which provide:

§59-G-1.23(g) Building compatibility in residential zones.

Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.

§59-G-1.26. Exterior appearance in residential zones.

A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.

Petitioner argues that the proposed tennis bubble would be compatible with the neighborhood, based on the testimony of its land planner, Alfred Blumberg (summarized in Part III of this report); on photos taken with balloons raised to various heights, including the proposed height of the bubble; and on a comparison with other tennis bubbles in the County.

When asked whether the proposed bubble would comply with Zoning Ordinance Section 59-G-1.23(g) § 59-G-1.26, Mr. Blumberg responded, that it would not have a residential appearance, but Petitioner was attempting to design, site and landscape it so it will fade into the background. Also, the scale and height is 35 feet, which is less than the 50 feet permitted in the R-200 zone. Given its

¹⁶ Presumably, if a proposed structure were found to be compatible, it would not adversely affect property values, in any event.

surrounding, landscaping and screening, Mr. Blumberg opined that the bubble does meet the compatibility finding required in those sections. Tr. 225-226.

The following photo (Exhibit 11(c)) is typical of the balloon photos submitted by Petitioner in Exhibits 11(a)-(t):

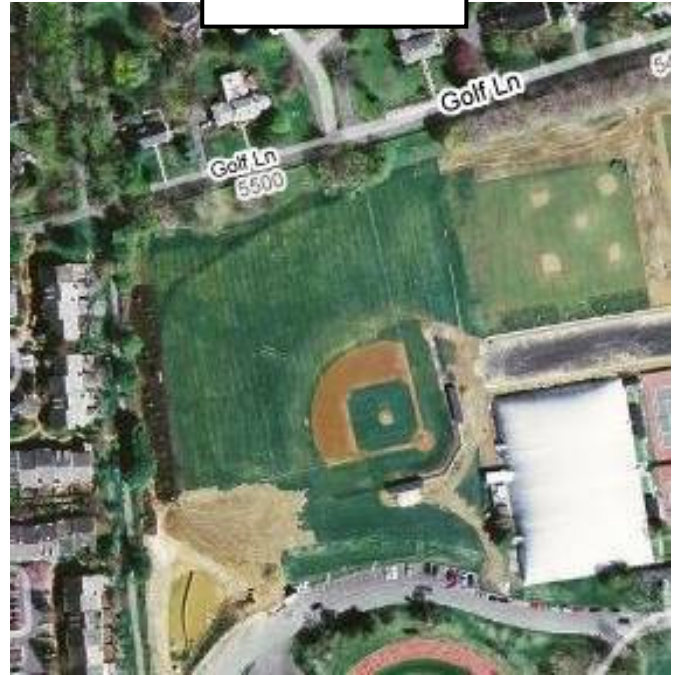
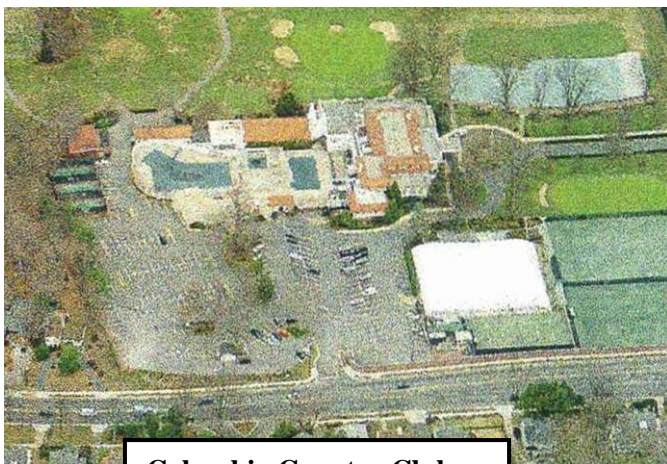


The Hearing Examiner finds these balloon test photos to be almost useless because they do not attempt to simulate the bulk of the proposed tennis bubble.¹⁷

Petitioner also produced photos and testimony regarding five other tennis bubbles in the County—Potomac Tennis Club (Exhibit 54(a)); Whitley Park (Exhibit 54(b)); Quince Orchard (Exhibit 54(d)); and Georgetown Prep (Exhibit 54(e)); and Columbia Country Club (Exhibit 66(k)). While it is not clear whether any of these examples relates to a community swimming pool special exception obtained under Zoning Ordinance §59-G-2.56, the Hearing Examiner agrees with Petitioner that this distinction is

¹⁷ More useful are the architect's renderings submitted by Petitioner, Attachment 12 to the Technical Staff report and Exhibits 66(g), (h) and (i). These will be discussed below.

irrelevant because the impact being examined is that of a tennis bubble on a single-family, residential neighborhood, and that impact should not be affected by the special exception's legal basis.

Potomac Tennis Club**Georgetown Prep****Quince Orchard****Whitley Park****Columbia Country Club**

On the other hand, each site must be considered based on its own characteristics. Some of the comparison sites chosen by Petitioner are clearly not comparable to the subject site. There is only one detached home near the Potomac Tennis Club, and it was built after the bubble was erected. There is a large nursing home nearby, but that is institutional in nature, and not the same as a neighborhood of single-family, detached homes.¹⁸ Georgetown Prep and Columbia Country Club are both on large campuses (*e.g.*, the Columbia Country Club is on a 146 acre site, compared to the 4.8 acre subject site), and the nearest residences to the Columbia Country Club bubble are separated by Connecticut Avenue and East-West Highway, two major roadways.¹⁹

The Whitley Park facility is near a townhouse development, not a neighborhood of single-family, detached residences. The Quince Orchard tennis bubble is more troubling because it is clearly located near to single-family, detached homes; however, the Quince Orchard tennis bubble is at the edge of the residential community, and is adjacent to a major state roadway, Quince Orchard Road (Md. Route 124), while the subject site is in the middle of a residential community, and adjacent to a much smaller roadway, Oaklyn Drive. The Board reviewed the Quince Orchard bubble and found it to be compatible with that site (Exhibit 61).²⁰ In reviewing the particular circumstances of the subject site, both Technical Staff and the Hearing Examiner find it to be incompatible with a structure of the size and bulk of the proposed tennis bubble.

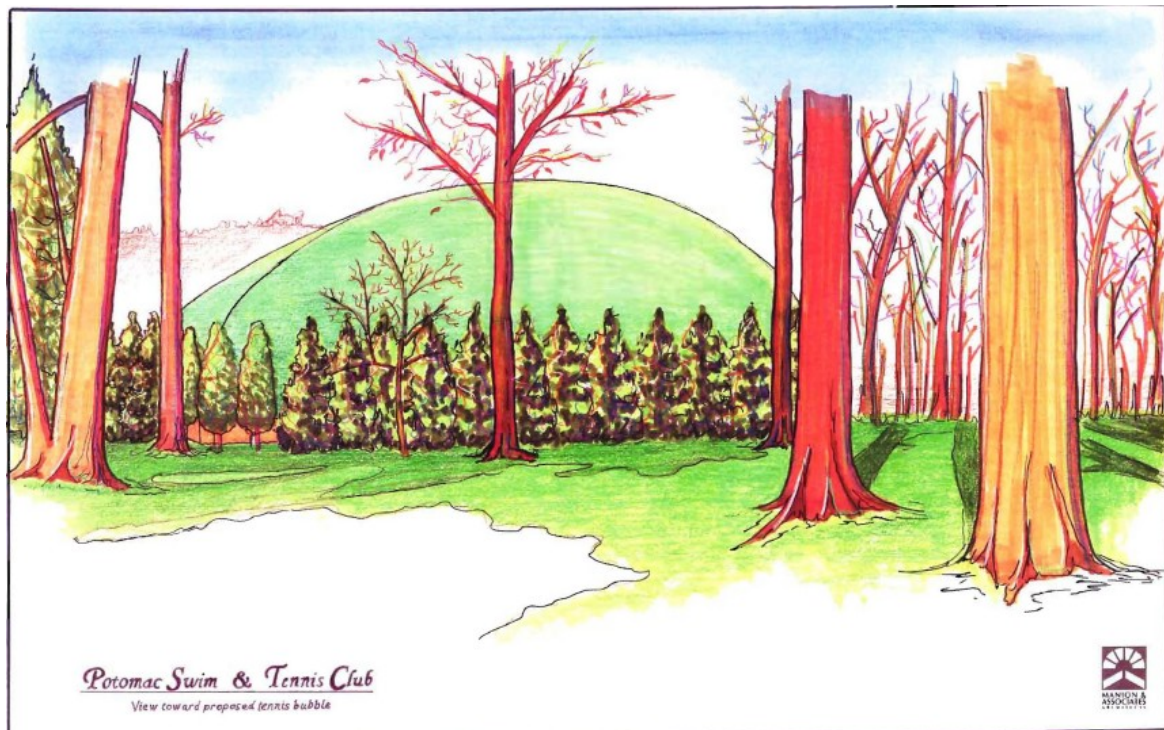
To understand the basis for this finding, it is helpful to look at some of Petitioner's own exhibits. On the following page are architectural renderings prepared by Petitioner's architects. They

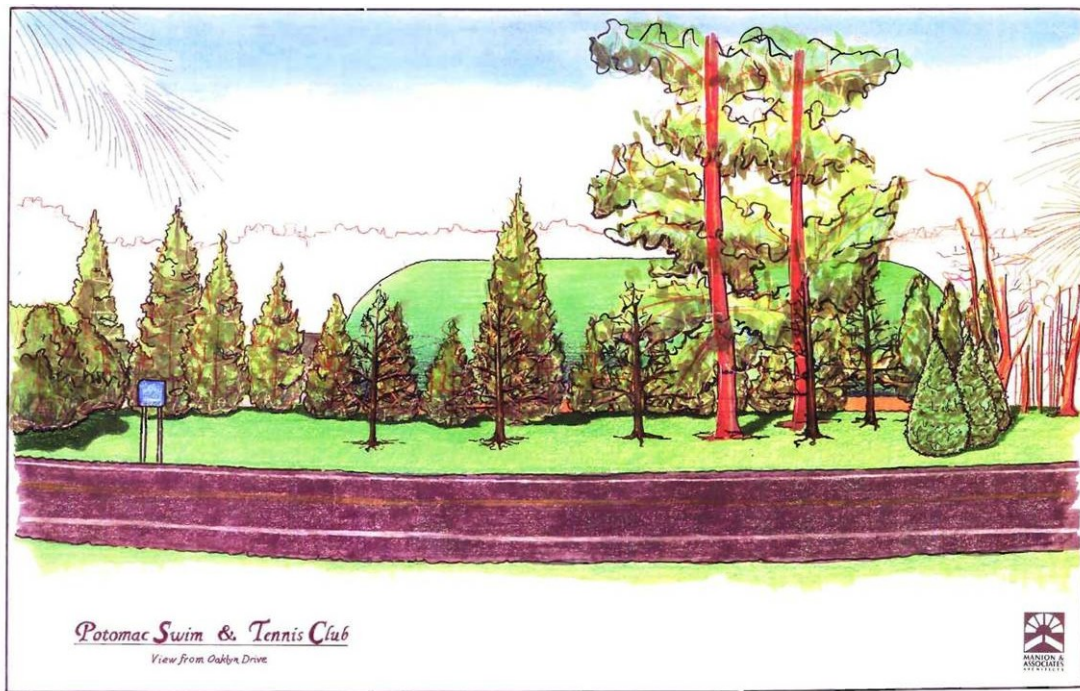
¹⁸ The Hearing Examiner does not accept Mr. Blumberg's suggestion (Tr. 205-206; 215-216) that there is no difference between placing this large structure next to somebody's single-family home and placing it next to an institutional structure like a nursing home.

¹⁹ It should also be noted that the tennis bubble compatibility issue was not reviewed in the Hearing Examiner's Columbia Country Club report referenced by Petitioner in Exhibit 66(k) because the Hearing Examiner determined that the Board had previously approved a tennis bubble at that location, and neither the location nor the size of the bubble was being significantly changed. The earlier ruling was therefore the "administrative law of the case."

²⁰ We do not know whether other proposed tennis bubbles may have been turned down by the Board because of incompatibility.

are the renderings which were redrawn to reflect the final landscaping and screening plans proposed by Petitioner (Exhibit 66(g), (h) and (i)):

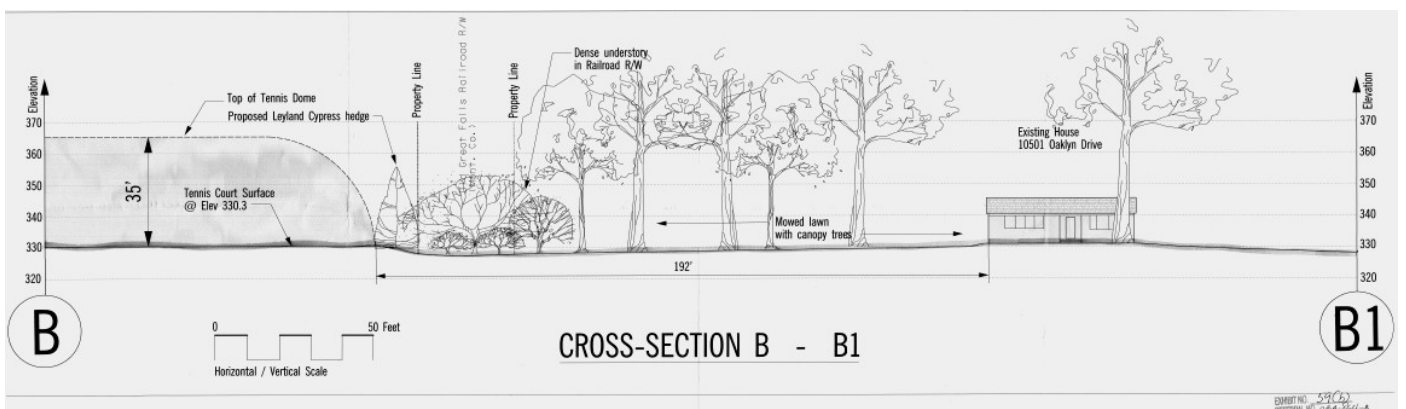
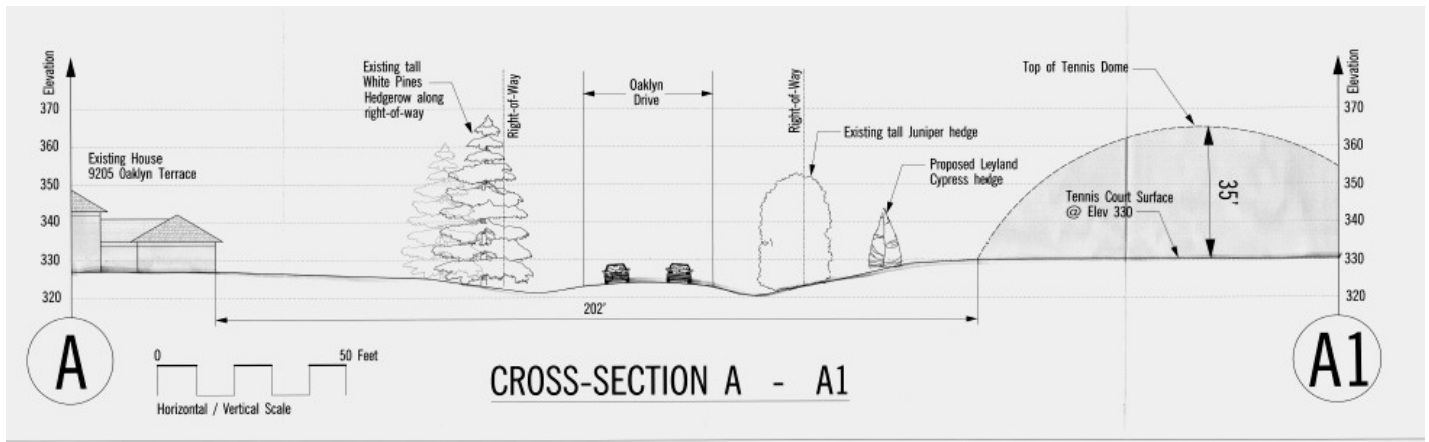




As is clear from these renderings, the proposed landscaping will not hide this large structure.

Mr. Blumberg testified that it would take eight to ten years for the screening trees to grow. Tr. 156-157.

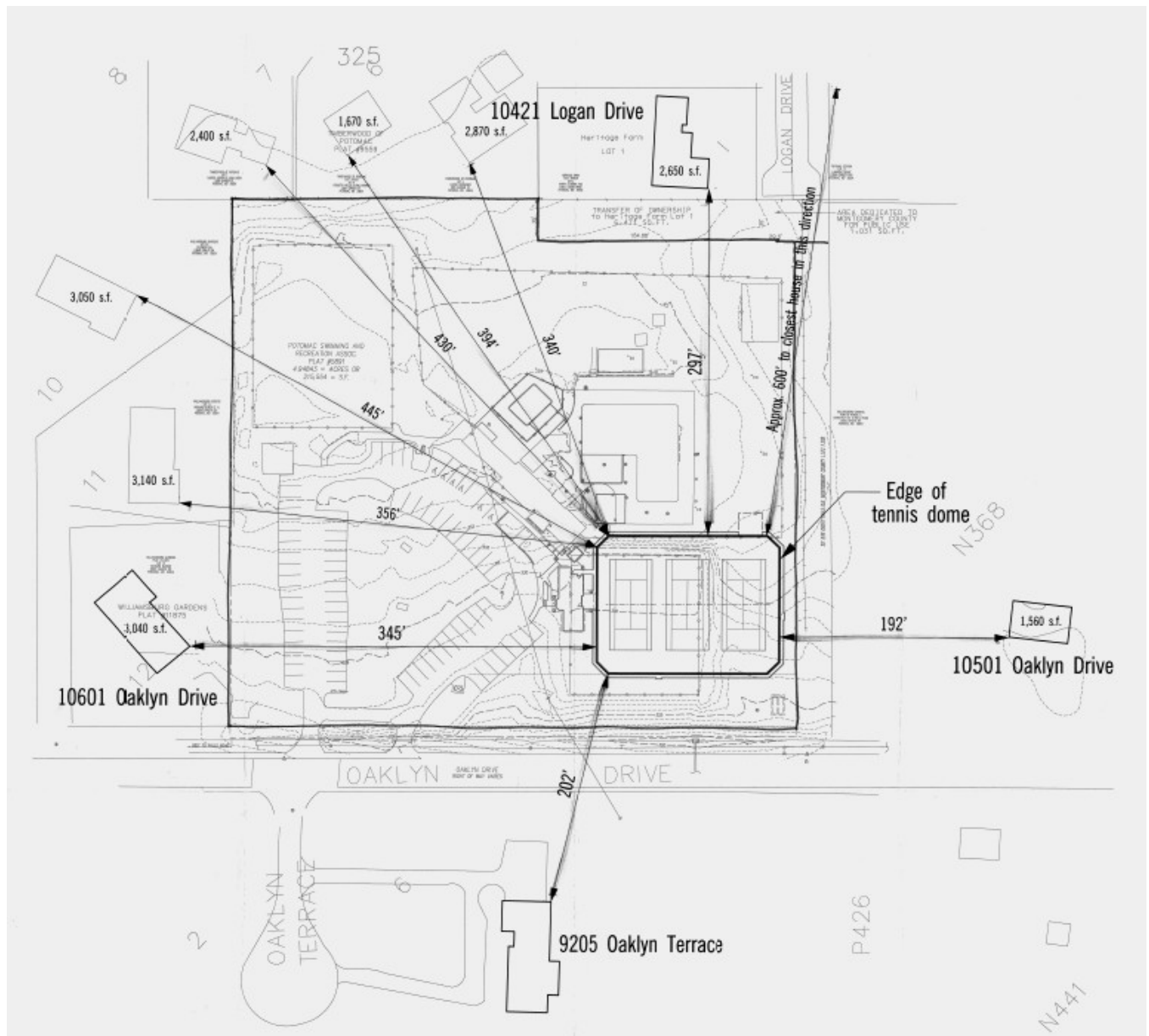
The cross-sections submitted by Petitioner (Exhibit 59(b)) clearly demonstrate the problem of bulk.



As stated by Vision Division's Technical Staff (Exhibit 23, Attachment 5),

The proposed tennis bubble is incompatible the adjoining neighborhood by reason of its bulk and character. The cross sections submitted on November 21, 2008 are the first graphics to truly depict the potential visual effect of the structure. At approximately 18,600 square feet in area and 35 feet in height, this opaque structure would dwarf the adjacent dwelling house at 10501 Oaklyn Drive, some 192 feet distant. The one story dwelling house has a footprint (scaled) of approximately 1500 square feet. The proposed landscaping would not sufficiently mitigate the effects of such a large monolithic structure. [Emphasis added.]

The distances to other nearby homes and the contrasts between their footprints and that of the proposed tennis bubble are shown on Exhibit 57:



It should also be noted that the base of the proposed bubble is at a five foot higher elevation than Oaklyn Drive (330 v. about 325), which means that the bubble will be 40 feet in height, relative to the adjacent roadway from which it will be often seen in the neighborhood. Moreover, Petitioner proposes to locate the bubble very near both the front and side property lines, in fact only 12 feet from the side property line. While that setback meets the Zone's requirement, it renders the situation less compatible with its surroundings because of the sheer bulk and size of the bubble.

Each site must be assessed based on its own characteristics, and this quiet residential neighborhood just does not lend itself to a tennis bubble of this bulk located so close to the property line and to the surrounding single-family homes.

2. Objections to the Proposed Lighting:

As discussed in Part II. C. 4. of this report, there is currently no lighting on the site, and new lights for the lower tennis courts, as well as the nearby parking area and tennis building are proposed. The objections to the proposed site lighting raised by the neighbors appears to be related more to the added late-night activity it will permit than to the lights themselves. *See* Summary of testimony in Part III. B. 2. of this report. George Barnes of the West Montgomery County Citizens Association (Tr. 235-246; 284) and Howard Diener (Tr. 107-120) asked that the lights be turned out by 8:00 p.m.

Technical Staff indicated that the proposed lighting would not adversely affect the residential character of the neighborhood, and confirmed that the lights would not produce excessive spillage into the surrounding neighborhood, as shown in the photometric study reproduced earlier in this report. In light of these findings, the Hearing Examiner concludes that it is not the lights, *per se*, which are objectionable.²¹ On the other hand, the WMCCA and the nearby neighbors make a legitimate point regarding late-night activity in this residential area. The Hearing Examiner finds that

²¹ One could certainly question having 20 foot tall pole lamps in a residential neighborhood, but they would be in a swim club that has had tennis courts operating for many years, so they do not seem out of place here.

9:00 p.m. is a reasonable cut-off time for all club activity, including the lights, and a recommendation to that effect is proposed in Part V of this report.

3. Noise from Equipment Used to Keep the Bubble Inflated:

Although the issue of noise from the equipment used to keep the bubble inflated was unsettled at the hearing, Petitioner submitted a noise study after the hearing (Exhibit 66(b)) which remains unrefuted. It indicates that if the bubble is approved, noise levels will remain within County standards at the property lines. If the Board adopts the Hearing Examiner's recommendation that the bubble not be approved, then, of course, the issue of noise from this equipment will be moot.

4. Danger from the Underground Propane Tanks:

Although some neighbors raised a concern about the proposal for underground propane tanks, there is no evidence that they would create a danger. Appropriate permits will be required for their installation, and all county, state and federal regulations must be adhered to. If the Board adopts the Hearing Examiner's recommendation that the bubble not be approved, then the propane tanks will not be needed, and this issue will be moot .

5. Use by non-members in a commercial operation:

Allegations were made that Petitioner has allowed use of the club by non-members and is commercializing the operation. Petitioner vows that only members and their guests will be allowed to use the club and that temporary membership counts towards the cap of 400 member families. Tr. 127, 283. So there will be no issue, the Hearing Examiner has recommended a condition to this effect in Part V of this report. Petitioner maintains that tennis rackets and the like are not sold from the tennis office, though an ad on Petitioner's website certainly calls that into question (Exhibit 74, Attachment A). To avoid commercialization of the club, a condition is recommended in Part V of this report.

6. Loud swim meets involving non-members:

The non-member use issue is discussed above. The question of loud swim meets is not before the Hearing Examiner because nothing in this modification petition relates to it. However, items such as this are best addressed at Community Liaison Council (CLC) meetings. Martin Klauber, Esquire, the People's Counsel, recommend that a CLC be established to promote communication between Petitioner and its neighbors and to help resolve matters of mutual concern. Tr. 21-23. As stated by Mr. Klauber, "Community Liaison Councils have been used by the Board of Appeals in 29 special exception cases. They ensure communications between the special exception holder and the community impacted by the special exception, that those continue for as long as the special exception exists." This recommendation would apply whether or not the tennis bubble is approved. The terms of the CLC were spelled out by Mr. Klauber (Tr. 21):

I would recommend that a community liaison council be established, to be composed of representatives of the special exception holder, representatives of the streets and/or community surrounding the special exception use, having the People's Counsel as an ex-officio member to facilitate the meetings, having four meetings of that community liaison council each year, having minutes taken of those meetings and having this special exception holder submit an annual report containing those minutes to the Board of Appeals.

The Hearing Examiner feels that Mr. Klauber's suggestion for a CLC is an excellent one, and language is recommended in Part V of this report to require its establishment by Petitioner.

7. Traffic and Off-Site Parking Problems:

There was considerable concern expressed by the neighbors about people parking on their property, as well as on the streets, during special club activities. There was no evidence of traffic problems created by the club, except to the extent that its permitted activities will naturally produce some traffic. These issues can also be addressed at CLC meetings; however, since the Board's 1975

resolution expressly prohibits parking off-site for club activities, the Hearing Examiner recommends the following condition in Part V of this report:

Petitioner must inform all members in writing that all those who travel to the subject site by motor vehicle may park only in Petitioner's parking facility, as required by this Board's resolution dated February 26, 1975 (Exhibit 12(d)). Petitioner must establish a system for self-enforcement of this requirement after reviewing the issue with the community liaison council. At the very least, this enforcement scheme must provide that members must submit their vehicle tag numbers to Petitioner, and Petitioner must establish a penalty scheme for violators, including expulsion from the Swim Club for the second violation. Petitioner must post a telephone number to report violations on the Club's website, and must appoint a parking coordinator to receive reports of violations and enforce the parking rules. Neighbors may also report violations directly to the Department of Permitting Services for enforcement of the special exception.

8. Trash issues:

Some concern was raised by the neighbors concerning overflow of the trash dumpster and inadequate policing of trash by the club. Petitioner's proposal to move the trash dumpster away from the property line adjoining residences should solve part of this problem. Mr. Sears testified that Petitioner has an existing contract with a waste management company that comes and removes the trash and recycling materials. Exhibit 51. For swim meets, Petitioner has two people police Oaklyn Drive, past the Manor Montessori School and then about three houses up towards Falls Road, to pick up trash. During the summer months, when the dumpster is most used, Petitioner asserts that the management of the pool will circle the dumpster to pick up any trash at least three to four times a day.

To alleviate the concerns about trash, the Hearing Examiner has recommended a condition requiring Petitioner to take steps to ensure that the site is maintained free of loose trash and other unsightly conditions. Problems in carrying out this condition should be taken up at CLC meetings.

Although Technical Staff expressed some concern about the new location proposed for the dumpster, the Hearing Examiner finds that its relocation will eliminate some of the unsightly conditions for the neighbors located adjacent to the current site, and that the new site will be screened.

III. SUMMARY OF THE HEARING

At the beginning of the hearing, the Hearing Examiner set forth a number of issues which needed to be addressed.

Footnote 6 in Petitioner's pre-hearing submission (Exhibit 36) argued that Zoning Ordinance §59-G-1.26 does not apply "in accordance with the express provisions of the community pool special exception." The Hearing Examiner indicated that the language in §59-G-2.56 made only §59-G-1.21(a) inapplicable. Petitioner's counsel agreed that the Hearing Examiner's reading was correct and that only §59-G-1.21(a) was exempted, "not the entirety of the 59-G-1.2." Tr. 13. The Hearing Examiner then announced his conclusion that the Section 59-G-1.21(a) general standards do not apply in this case because §59-G-2.56 so requires; §1.24 (Neighborhood Need) does not apply because both the swimming pool and tennis courts were previously approved; but the standards under §§ 1.22(a) (Additional Requirements); 1.23 (General Development Standards); and 1.26 (Exterior Appearance in a Residential Zone) do apply, as well as the specific standards under § 59-G-2.56 for Community Swimming Pools.²²

Additional issues raised by the Hearing Examiner were whether the proposed tennis bubble fit within the definition of a "building" under §59-A-2.1; whether tennis bubbles are permitted under §59-G-2.56; and whether tennis bubble are "necessary or incidental" to a swimming pool, as specified in the definition of community swimming pools in §59-A-2.1. Tr. 17-18.

²² The Hearing Examiner also challenged another part of Footnote 6, in which Petitioner argued that the case of *Pierce v. Montgomery County*, 116 Md. App. 522 (1997) supports Petitioner's position. That case merely held that the BOA had a substantial basis to find that a physical expansion of a structure in a Baptist Home for children was not an "expansion of the use." The courts distinguish between an expansion of a use and a mere intensification of that use. *See, e.g., McKemy v. Baltimore County*, 39 Md. App. 257, 269-70, 385 A.2d 96 (1978); *Lone v. Montgomery County*, 85 Md. App. 477, 496-97, 584 A.2d 142 (1991). In the subject case, however, there is a statutory provision, 59-G-1.3(c)(2), that requires only a change in the "intensity of the use" (*i.e.*, not an expansion of the use) to trigger the requirement for a hearing on the modification, and another provision 59-G-1.3(c)(4) that requires only the structural expansion of floor area by more than 25% or 7,500 square feet to make the underlying special exception subject to review. Since Petitioner concedes that there will be an expansion of floor area by more than 7,500 square feet, the *Pierce* case is inapplicable. Tr. 14-15.

Towards the end of the hearing Petitioner asked for and was granted leave to submit a supplemental filing regarding Master Plan compliance, with an opportunity for all interested parties to comment thereon. Tr. 271-277.

A. Petitioner's Case

Petitioner called four witnesses at the hearing, and one community witness, Eric Gary, turned out to be a member of Petitioner's Board of Directors, so the Hearing Examiner has listed him as a Petitioner witness, not a community witness. The four witnesses called directly by Petitioner were Ted Sears, Petitioner's President; Kurosh Nasser, Director of Tennis Programs; Alfred S. Blumberg, Land Planner; and Steven Staudenmier, a representative of the company that would install the tennis bubble. Petitioner introduced Exhibit 47, a revised site plan which replaced Exhibit 4.

1. Ted Sears (Tr. 50-95, 120-127, 282-283):

Ted Sears testified that he is the President of the Board of Directors for the Potomac Swim and Recreation Association, and has been a member of the club since 2001. He is a strong proponent of community and County participation. He is also a member of the West Montgomery County Citizens Association.

Mr. Sears described the Potomac Swim and Recreation Association as a nonprofit organization and one of the oldest County swim clubs. It has been in existence formally since 1962. Some of the tennis courts have been there for decades. He testified that the club has gone through some difficult times. Petitioner found there are essentially three reasons why there's been a tail-off in membership over time. One is related to demographics. People age and it has been stated earlier, as families age, children grow up and leave, and swimming tends to be a sport where the families are a member while their kids are swimming but then once the kids grow up, they outgrow the club and they leave. Tennis tends to be a sport where there's more of a lifelong desire to play it as a sport.

Second, there's been somewhat of a change over the last 10 or 12 years related to some of the activities that people in our neighborhood tend to participate in. The Club is competing against growing numbers of people who attend country clubs, as well as a greater number of recreational opportunities for children. There are a plethora of day camps now in existence that weren't 10 years ago. And in addition, there are many more overnight camps, and people are availing themselves of these opportunities more.

In addition to that, many people have second homes now, take vacations at the beach or they go for weekends at the beach and they found that the club has not been something that has fit into their summer schedule. Some of these things have affected membership in the Club. So the Board has been looking at ways to address this issue. One is trying to attract new members, and the second prong has been to retain existing members.

In terms of addressing increasing our new membership, in the past three years, Petitioner has undertaken some significant renovations through some special exception modifications, changing the design of the pool and increasing shade structures; replacing the pump and other equipment. Petitioner also felt it could retain members by providing indoor tennis as a recreational opportunity.

Mr. Sears summarized the proposed improvements, and indicated that the new overhead lighting would be specially designed with shielded lights that would not allow any light spillage. These would be used during the summer months, from May 1 to September 30, and they would be accessible only by a key code. You'd need a pass code and special key code. They would be on timers and would shut off automatically at 10:00 p.m. The addition of the lights was at the request of the members. Petitioner submitted photometric studies of lighting both with and without the tennis bubble (Exhibits 48 and 49). The cover would be an opaque forest green court cover material (Exhibit 50), which Petitioner chose after examining other facilities. No light will come from such a structure,

except for the doorway. The exterior of the court cover will not be lit, but there will be parking lighting, walkway lighting.

The tennis court cover would be up from October 25 through April 14th, with operating hours from 6:30 a.m. until 11:00 p.m. The proposed tennis office building would house an office as well as restrooms and a shower facility. The tennis office itself would be about 350 square feet, while the existing tennis office is about 260 square feet. The existing tennis office is part of the existing bathhouse facility, so Petitioner would not be tearing it down. Having a tennis office near the lower courts would also benefit the neighbors by moving some of the tennis program from the upper courts to the lower courts. In the summer months and when there are clinics involving children, they would be housed principally down at the lower courts, away from the neighbors.

The last piece is the proposed landscaping changes where Petitioner is working to retain the existing buffer of Leyland cypress and would be adding additional landscaping.

Mr. Sears further testified that Petitioner has an existing contract with a waste management company that comes and removes the trash and recycling materials. Exhibit 51. For swim meets, Petitioner has two people police Oaklyn Drive, past the Manor Montessori School and then about three houses up towards Falls Road, to pick up trash. The relocated dumpster will be the same size. During the summer months when the dumpster is being used with some frequency, Petitioner has a policy of having, at least three to four times a day, the management of the pool circle the dumpster to pick up any trash.

As to the charge of commercialization, Mr. Sears testified that there was a time that Petitioner did allow nonmembers to use the facility to take lessons. It never amounted to more than 10 or 12 people per season but that was just an attempt to attract more members. Since Petitioner learned that it is not acceptable, it put in place specific provisions that do not allow nonmembers to take lessons or

participate in clinics. Nonmembers can play tennis with a member, if they pay a guest fee. The maximum number of members allowed in the club in any year is 400 members. This would not be exceeded even if tennis is played during the winter months. Tennis rackets seen in the tennis office may be used if someone is interested in trying out a different kind of racket. None of these rackets are for sale.

97 percent of Club members come from Potomac and the Bethesda area, and specifically, 86 percent come from local Potomac (Zip Code 20854). There is one member who comes from Virginia, and including that person, three percent comes from D.C., Virginia or outside of the County.

Mr. Sears used a PowerPoint presentation to show other sites with tennis bubbles, as well as the subject site (Exhibits 54(a)-(v)). He also showed a "balloon test" where balloons filled with helium rose to the 35 foot height of a court cover.

As to parking issues, Mr. Sears suggested that the tennis bubble at most could add 12 players with 12 cars. If there were people working at the facility at the time, say the tennis pro, his assistant and maybe one other staff person, there'd be three additional cars. There are 73 parking spaces, which is sufficient parking for that number of people and far fewer than what you would see on an average day in the summertime. At the time that the court cover is open, the pool will not be operational, so aside from use by people using the tennis facilities, there will be no other parking needs on the site.

Because one of the Planning Board members suggested that additional landscaping would help screen and enhance compatibility for the court cover, so Petitioner developed an additional screening for the facility that would run alongside, to the north- northwest, along the Backus and Diener's homes. The types of trees was switched to Leyland cypresses which grow faster. Additional pin oaks and vegetation have been offered as well. The landscaping plan would be amended to so reflect.

Mr. Sears described Petitioner's community outreach efforts, and agreed to a community liaison council, as suggested by the People's Counsel.

As to claims of speeding traffic, Mr. Sears observed that anyone who is turning into the facility has to come to a speed of approximately five miles per hour or less, so the club is actually an asset and helps to slow traffic down. With regard to claims of busses of children coming to the Club, Mr. Sears testified that Petitioner never had any involvement with Connelly School, which he believes is the Holy Child School. Seven years ago, there was a girl's tennis team that did use the courts for one season as their facilities were out of use. Petitioner has never had any drop-offs or any connection whatsoever with the Bullis School. The Manor Montessori School, in the summertime, has a toddler camp, preschool camp and twice a week for, about an hour-and-a-half, from 10:00 to 11:30 in the mornings, the school does bring one of the short orange buses and about 12 to 15 children are dropped off for splash time. Mr. Sears could not answer whether the Manor Montessori School is a Club member, and if not why they get to use the pool. He said it would be something that Petitioner would have to revisit if that's an issue. Petitioner does not have any relationship with any other organizations that bring nonmembers or kids or other groups to the pool this year.

According to Mr. Sears, the 400 membership cap includes anyone who is a member, whether permanent or temporary. He confirmed that the use of this facility would be for members only.

2. Kurosh Nasser (Tr. 127-144):

Kurosh Nasser testified that he lives at 9916 Conestoga Way, Potomac, and has been a member of Petitioner's board for the past three years. His family spends a substantial portion of each summer at the club. He is familiar with other similar clubs, and they almost all have both swimming and tennis. Almost all the ones that have tennis courts have outdoor lighting. He did not know how many of them have bubbles. The ones with bubbles close midnight, at the latest. The one at Cabin

John, the County facility, opens at 6:00 a.m. and closes at midnight. Bretton Woods closes at 11:00 p.m. Whitley Park closes at 11:00 p.m. Quince Orchard, he believes, closes at midnight. Wheaton closes the same time same as Cabin John. Bullis, he did not know, but believed it was in the range of 11:00 p.m.

Mr. Nasser described the tennis program and stated that the intention of the bubble is to allow the kids that are in junior programs to stay at the club because typically, as soon as the indoor season starts, they can't play at the clubs, so parents have to scramble and find comparable opportunities at other area facilities. Many club members are interested in having indoor tennis, and they will easily use up the court time available. Whoever participates in any type of clinic, any type of use of the courts has to be a club member or a guest of a member. The tennis pro does not maintain any inventory in the tennis office, but he will order a racket for a member to save them money. The rackets on hand are for demos or for kids who forgot their rackets. He calls it a tennis office and not a pro shop because he doesn't want people to get the impression that they can go there to start shopping for products.

Mr. Nasser stated that Petitioner would have at least 60 percent of the cost of construction available for the proposed changes.

3. Alfred Blumberg (Tr. 145-175, 182, 195-208, 214-233, 280-282):

Alfred Blumberg testified as an expert in land planning. He described the property, and indicated it has two access points two onto Oaklyn Drive. It has one way circulation generally, in at the easternmost drive way into and around the parking areas, and then out back onto Oaklyn Drive at the western, near the western corner of the property.

There are seventy-three parking spaces on site, and there are two areas with tennis courts. One is in the northwest corner where there are three tennis courts, and currently two tennis courts in the

southeasterly corner. The swim pool, which is an upside-down "U" shaped configuration, is surrounded by apron, and that's the main pool, and then there's a kiddie pool to the northwest of that. The existing building, the bathhouse and the entranceway, lifeguard's quarters, is in the building right in front of the swimming pool area. In the back, there are trees and grass, picnic areas. There is a small basketball court type area in that northeast corner, and there's an existing play structure and a couple of canopies for shade.

Mr. Blumberg introduced Exhibit 56, which is a color rendering of the special exception plan with the tennis improvements as well as the landscape and lighting. He described the landscaping as a combination of Leyland cypresses right in front of the existing tennis courts and other evergreen non-deciduous plant materials in a very deep and high hedgerow along and parallel to Oaklyn Drive, just to the east of the eastern entranceway. As a result of the changes that are represented due to the discussion at the Planning Board, Petitioner added trees along this western property line adjacent to the Diener residence and the Backus residence over on the west side.

Petitioner is proposing a series of American hollies, which is an evergreen plant material, to be planted at seven to eight feet in height zigzagged along that western property line to provide some screening closer to the abutting residences which could possibly look across the parking lot and existing vegetation and see the tennis bubble. Also, along the eastern side of the tennis court, adjacent to the easternmost property, Petitioner now proposes to plant Leyland cypress, which are a fast growing evergreen and thick material. They would be five to six feet in height when planted and grow to 35 feet within eight to ten years, so they will not screen the bubble entirely from day one but as they mature, they will eventually get to 35 feet. Existing vegetation at the southeast corner of the courts would also be supplemented with additional Leyland cypress.

There are already a couple of deciduous trees and Petitioner is going to supplement those with pin oaks. Pin oaks are 18 to 20 feet in height at the time of planting. Petitioner is trying to create a screen all the way across Oaklyn Drive to screen both the tennis courts, the lights and the tennis bubble.

In the northeast corner of the proposed new tennis courts is a tan-colored area and that is the area where the pump will be located and emergency generator to make sure the bubble stays up if the power goes out and protect the people. So there will be some mechanical equipment which is going to be there on a permanent basis to support the air that holds the bubble up.

Petitioner was required by the Department of Permitting Services to provide some storm water management for the new structures only. Petitioner did not need to go back and retrofit the entire property, but the new structure and development including the building will be accommodated in a storm water management sand filter area in the southeast corner. According to Mr. Blumberg, the stormwater management concept plan has been approved by Department of Permitting Services.

Exhibit 57 was used by Mr. Blumberg to show the distances from the proposed tennis bubble to the nearby homes. The closest house is at 10501 Oaklyn Drive, which is the east of the subject property, 192 feet to the existing structure from the edge of the tennis bubble. All the others are much farther than that. Ms. Lloyd's property is across Oaklyn Drive. It's an arterial highway which is intended to carry quite a volume of traffic. From the closest point of Ms. Lloyd's house to the closest point of the bubble is 202 feet, from corner to corner.

The distance, going clockwise around the property, the address of 10601 Oaklyn Drive is 345 feet, so most of these are quite a distance because the bubble is in the southeastern corner and all the houses are to the north and west. It is 345 feet to the address referenced, 356 feet to the next house to the north, 445 feet to the property closest to the existing tennis courts in the northwest corner. Then

others at 430, 394 feet, 340 feet, 297 feet to the nearest property that fronts on Logan Drive. To the northeast, it is just over 600 feet to the closest house on the east side of Logan Drive. Some cross-sections illustrate the two closest homes and their elevations (Exhibits 59(a) and (b)).

He identified the elevations -- the surface elevation of the tennis courts will be at elevation 330, which is just a little bit higher than the elevation of Ms. Lloyd's house, which is at about 327. And it shows the relative configuration of the tennis bubble. Looking either in an easterly or westerly direction on Oaklyn Drive, you'll see the elliptical semi-circular configuration of the tennis bubble at a maximum of 35 feet in height. It shows that distance, 202 feet from corner to corner, put into context of the house and the tennis bubble.

Also on Exhibit 59(b) is a cross-section that leads to 10501 Oaklyn Drive, and this basically runs parallel to Oaklyn Drive in the foreground. And so the tennis bubble takes on the configuration, with its length parallel to Oaklyn Drive and 12 feet to the side property line. Then there is existing vegetation, both under-story and high tall trees between the property line and the house at 10501 Oaklyn Drive. The house is a relatively small ranch style, probably built in the '50s. It is 192 feet from corner to corner and again, the cross-section shows the 35 foot height of the tennis bubble.

Even if one considered the tennis bubble to be a building, it qualifies as being no closer than 125 feet from any existing single-family or two-family home. It is not, however, 75 feet from the nearest property line. It is going to be 45 feet from the new front property line to the edge of the bubble. Mr. Blumberg used the term "new property line" because the club has agreed to dedicate a certain distance along the frontage of Oaklyn Drive to that right of way. To the east, on the eastern property line, the bubble is 12 feet from the property line, relying upon the interpretation of the Department of Permitting Services, that the bubble would not be a building but a structure, which only had to meet the minimum setbacks of the zone.

As specified on the landscape and lighting plan, there will be four new residential type lights on 10 foot posts in the parking area, but only the parking area that's closest to the tennis building and their locations are indicated on Exhibit No. 56. Today, there are no lights in the parking lot and so as a safety issue, since people are going to park closest to the entrance to the tennis building, pole lights are located there. So there are going to be two new sets of external lights: 10 foot posts with lights in the parking lot, and lights that will illuminate the tennis courts outside when the bubble's not up. According to Mr. Blumberg, the lighting photometric plan illustrates that the light intensity will not exceed 0.1 footcandles at the property's edge.

Exhibit 58 graphically shows the area that's in tree shade on the parking lot.

Mr. Blumberg noted the location of the old Great Falls Railroad right of way, and it runs parallel to the eastern property line of the swim club, according to the tax records. The right-of-way is 12 feet from the tennis bubble.

Exhibit 55 shows the subject property in question in the middle of the illustration based upon the zone on the zoning map obtained at Park and Planning, and the green indicates either properties which have put a deposit for the tennis bubble time or have expressed written support for the addition of the tennis bubble on the property. Mr. Blumberg created this exhibit to illustrate that there are properties that are in close proximity to the property which are in support of the proposed tennis bubble.

Mr. Blumberg testified that he accepted the Technical Staff's definition of the general neighborhood. Tr. 175. He also estimated the distance of the bubble pump machine housing as 20 -25 feet from the property line. Tr. 182.

Mr. Blumberg addressed the standards in Section 59-G-2.56 which is the swimming pool, community, special exception. The setback issues raised in Item (a) do not apply to the tennis bubble because it will not be a building, according to DPS.

Item (b) requires a public water supply for the pool unless a private supply will not have an adverse effect. According to Mr. Blumberg, this pool is actually hooked up to a well and has been operating that way since 1963 or so; it has not had any adverse effect on the water supply and there's no reason to change it at this point in time.

Item (c) requires screening the pool by a fence, wall or shrubbery to substantially screen such pool from view of the nearest property of a residential zone. Now, that references the pool but Mr. Blumberg opined that it's also applicable to the accessory use here of the tennis cover and so Petitioner has made substantial efforts to screen and landscape the tennis bubble as well. It's not going to make it be totally screened from the surrounding area but the landscaping, both existing and proposed, will help to screen it.

The tennis bubble is proposed to be green and it's a glossy material, but it will weather within a year. It will be faded by the sun, by the weather, by the rain and that will very quickly have a almost a gray patina on it to make it less visible. Mr. Blumberg opined that between that and the landscaping material, the structure is going to be essentially screened in a very short amount of time. People will notice it initially, but it quickly will be subsumed into the background. It doesn't have any windows, doesn't have any light, doesn't emit any light. It is going to be surrounded by landscaping and will be very unobtrusive, in his opinion.

Item (d) calls for special conditions deemed necessary to safeguard the general community interest and welfare, such as provisions for off-street parking, which have been made, additional fencing or plantings or other landscaping, which has been done, additional setbacks from the property

lines, which he doesn't think are necessary, the location and arrangement of lighting, which has all been documented in the photometric and lighting plan, compliance with County noise standards and other reasonable requirements, including financial responsibility. That was discussed by members of the club. The noise standards will get addressed as previously indicated and other than that, Mr. Blumberg opined that Petitioner has met the conditions of item (d).

Mr. Blumberg agrees with the things listed by Technical Staff as inherent characteristics, but disagrees with some items they listed as being non-inherent to a community pool. Staff indicates that the layout of the site, the size of the membership, the number of swim meets and additional activities such as basketball, exercise equipment and outdoor and indoor tennis courts are non-inherent characteristics of a community swimming pool. In Mr. Blumberg's opinion, swim meets, basketball, exercise equipment and tennis courts are all inherent. It's been testified earlier by other people that most community pools do have tennis courts associated with them. In his experience, more than 50% of swim clubs have tennis courts. He agrees that the proposed "bubble is indeed non-inherent." Tr. 202. However, it is his conclusion that it does not rise to the level of denying the special exception or this particular use at this location.

Mr. Blumberg described the Potomac Tennis Club. Adjacent to its tennis bubble, which is located in the upper right-hand corner of the photo, there is an existing house which does not have frontage or access from Tennis Court Drive but is located 210 feet from the nearest tennis bubble, closest corner to closest corner,. So, it is a comparable type of distance to what he discussed with regard to the Oaklyn Drive facility. He also pointed out that at the bottom of that photograph is the Manor Care Nursing Home, which he characterized as "a residential use" within 50 feet of the nearest tennis bubble. It was approved as a special exception for the private tennis club, so the general standards would have applied. The nearby house was erected thereafter.

Referring you to Exhibit 54(b), which is titled Whitley Park 3 court cover, Mr. Blumberg testified that the tennis bubble is within the 35 feet of the closest townhouse, but he did not know whether they were built before or after the bubble. They may have been built as part of the recreation amenity package of the residential community. In Mr. Blumberg's opinion, it makes no difference whether the nearby residences are detached homes, townhouses or institutions.

Exhibit 54(d) is entitled Quince Orchard four court translucent cover. The taller bubble, the one over the tennis courts, is less than 100 feet from the nearest single-family residence on the other side of the street. Mr. Epstein's letter identifies that the tennis cover was built before the homes, but according to Mr. Blumberg, the swimming pool bubble (33 feet high) was built after the homes were in existence along the roadway. It is a private club. Both the Potomac Tennis Club and the Quince Orchard tennis facility and swimming pool cover are on four acres, like the subject site. Mr. Blumberg finds them comparable to the subject case, but the compatibility is much enhanced at the Potomac Swim and Tennis because of all the landscaping and screening that's both existing and proposed. The Quince Orchard bubble is translucent and has very little landscaping and screening associated with it at all, so from a visual compatibility aspect, the Potomac Swim and Tennis proposal is much more compatible with abutting single-family residential than the Quince Orchard facility. Quince Orchard Road is very close to the Quince Orchard tennis bubbles, but the immediate and surrounding roads are residential, two-lane roadways.

[According to Petitioner's counsel, the two illustrations on attachment 12, color renderings attached a attachment 12 to the technical staff report, were prepared by Manion & Associates, Petitioner's architects.] Mr. Blumberg indicated that these renderings do not reflect any of the supplemental landscaping that is shown in Petitioner's proposal, in the proposed landscape plan.

When asked whether the proposed bubble complies with Zoning Ordinance Section 59-G-1.23(g) § 59-G-1.26, Mr. Blumberg responded that it would not have a residential appearance, but Petitioner was attempting to design, site and landscape it so it will fade into the background. Also, the scale and height is 35 feet, which is less than the 50 feet permitted in the R-200 zone. Given its surrounding, landscaping and screening, Mr. Blumberg opined that the bubble does meet the compatibility finding required in those sections.

Mr. Blumberg stated that he did not know how many community swimming pool special exceptions have been granted by the Board of Appeals. [Petitioner's counsel indicated she would provide a list and note which have tennis courts associated with them.]

Mr. Blumberg further testified that the cross-section on Exhibit 55(a) between Ms. Lloyd's home and the tennis bubble shows that there is a slight grade differential between the road and the land between the road and the tennis surface, but that's primarily due to a swell for drainage along both sides of Oaklyn Drive. It would appear that the surface of the tennis court will be slightly higher than the road surface by a factor of about five feet but not ten feet.

4. Steven Staudenmier (Tr. 178-195, 277-280):

Steven Staudenmier was identified by Petitioner's counsel as the representative who will install the tennis bubble and related equipment. He testified that Exhibit 10 is a noise level document that's prepared by the engineers in the factory that builds the bubbles. Mr. Staudenmier will construct the bubble on the property, but Yeadon is the supplier of the structure and the manufacturer of the structuring components.

He explained the numbers on the exhibit. The top number in the circles is how many feet from the machinery. The lower number in the circles is how many decibels of noise the thing puts out. It's continuous noise and doesn't change pitch. The doghouse is a term that's used to indicate where the

controls are inside. The noise analysis presumes that there is no buffering or screening between the mechanical unit and adjoining properties. There will be buffering on this property, probably an eight-foot high block wall built right around the mechanical perimeter to buffer all of that noise. People will be able to stand on the backside of that wall and hear absolutely nothing.

As to noise from the tennis activity, if you're standing five, ten feet from the building, you can hear voices inside if they're yelling or screaming. If they're just playing tennis, you'll hear a muffled racket slap once in awhile or you'll hear the ball hit the side of the dome, if you're that close. From say the sidewalk out on Oaklyn Drive, Mr. Staudenmier doesn't believe you would hear anything. The noise of play is lessened by the tennis cover.

Generally, when noise is a concern of any kind, the wall is put right around a mechanical pad. It does two things. It hides the equipment from eyes and it stops the noise. If the County says it cannot exceed six feet, then that's what it can be, or it doesn't have to be there at all. It's not a requirement. [Petitioner's counsel indicated that she would submit an amended site plan showing a noise wall around the equipment.] By the time you reach the property line, according to Mr. Staudenmier, you would be under 65 decibels, which is the County daytime noise level. [Since nothing in the exhibit showed that the nighttime noise level would be under 55 decibels, Petitioner was given permission to supplement the exhibit after the hearing.]

Mr. Staudenmier further testified that the square footage of the tennis court is 18,600 square feet, and the lower number, 18,172, is the square footage of the tennis bubble, because it goes in about nine inches inside of the fence line, so that accounts for the difference in the square footage. The one is a tennis court area and the other is the square footage of the bubble.

According to Mr. Staudenmier, the gas company would install the propane tanks, and with respect to safety, would be required to go through the requisite permitting procedures. A licensed

mechanical contractor will hook up the furnace unit, and everything is done through the permit process. Two proposed underground liquid propane storage tanks are 10 feet from the property line according to Exhibit 47. They are refilled once or twice a month depending on the weather.

Mr. Staudenmier further testified that the typical height of tennis bubbles in the county is 36 feet, and most club owners now are asking for 40 feet of height.

5. Eric Gary (Tr. 98-106):

Eric Gary lives at 14029 Gorky Drive [which is miles from the subject site]. He testified that he is a member of Petitioner's Board of Directors. He emphasized the importance of physical activity on the community children's academic performance, citing a study by the National Association for Sport and Physical Education and the California Department of Education. He also stated that it was important maintain a community-based recreation facility so that community members won't have to spend \$100,000 to join Congressional or Bethesda Country Club.

Mr. Gary said that he heard people say that buses drop children off to take tennis classes or to use the swimming pool, and that that is a violation of the Association's rules. He noted that Petitioner is a community pool, and the Club helps them but does not make any money from it. The kids are from the Montessori school, and the Montessori school is a member of the Club.

Mr. Gary further testified that he cannot think of anything that Petitioner could do more to appease the neighbors in all regards, including the willingness to add to the screening.

B. Community Witnesses

Three community witnesses testified in support and nine testified in opposition, the latter including the West Montgomery County Citizens Association.

1. In Support of the Petition:**a. Lois Williams (Tr. 30-33):**

Lois Williams testified that she and her husband live at 9418 Thrush Lane, two streets away from the Potomac Swim and Recreation Association. They are about 800 feet from the club, close enough to hear the swim meet noises and for her children, who are now grown, to walk to the pool. They are appreciative of the pool as central to the cohesive neighborhood, and they are supportive of the Association's proposal for a tennis bubble and a winter tennis program, believing that winter tennis could be a neighborhood asset.

Mrs. Williams took issue with the words of the planning department staff report, finding that the bubble would be an unacceptable visual feature. She admitted that the tennis court bubble will “loom large,” but stated that it will not be larger than nearby houses. And while the tennis bubble will not be completely screened, most of the existing junipers and Leyland cypress will be maintained. She felt that these massive plantings will visually break the bubble's mass, especially for homes to the northwest on both sides of Oaklyn Drive. Property to the southwest, across Oaklyn Drive, has its own screening trees; property to the southeast is separated from the bubble by trees on the railroad right of way; and homes to the east are separated by a forested half acre.

Mrs. Williams concluded that the bubble will be large, but its dark green mass will not be obtrusive and the neighborhood will benefit from a winter tennis facility and its additional opportunities for neighborhood interaction and community building.

b. Catherine Stanhope (96-98):

Catherine Stanhope testified that she lives at 9320 Garden Court in Potomac, four doors away from the pool. She observed that comments from some of the neighbors addressed the swimming pool, the swimming meets and the noise, traffic and trash that they generate. These comments are not

pertinent to the bubble. People who bought next to a swimming pool should not be surprised that it's noisy at times.

As to the proposed bubble, Ms. Stanhope stated that there are many large houses in the neighborhood that are 10,000, 15,000, 20,000 square feet, benefiting few people. The tennis bubble will benefit the whole community. As a mother with two teenagers, she is looking for anything to get them away from the computer and the TV to a winter activity they can walk to.

Ms. Stanhope likes living near the club and listening to the people, the kids screaming and enjoying the pool in the summer. She thinks that is a good thing.

c. Carlotta Wells (Tr. 246-252):

Carlotta Wells testified her family has lived at 9301 Garden Court in Potomac since June of 1998 when they became active members of the Potomac Swim and Recreation Association. Their property (Lot 6) adjoins the club's property on the club's northern side, next to the upper tennis courts. There is also an easement that permits club members to walk to the club from Garden Court along the western side of her lot. She supports of the club's special exception modification request.

Mrs. Wells believes that she will have a view, through her rear windows, of the proposed tennis court cover during the winter months. She has been told that the court cover will be about 390 feet from her home, and it will be an opaque dark green color and will stand 35 feet high. With appropriate landscaping, as the club is proposing, she believes that the temporary structure will blend in with the neighborhood and therefore, will not have a negative aesthetic impact. Even though the structure will be close to Oaklyn Drive, this proximity will be mitigated by the eventual presence of mature trees in front, combined with the color and height of the tennis court cover. The neighborhood has a number of large structures already in it, most of those are residential. Ms. Wells does not think

that this structure, in and of itself, due to its size, will be inconsistent with other structures in the neighborhood.

Mrs. Wells is also not concerned about the extra use of the property during the winter months. During the last 10 years, she has not had any problems with the pool as a neighbor. Summer, obviously, is the busiest season but the tennis programs begin in April and continue into early November so there are already club members using the club most of the year. Her husband uses the courts. As to the concerns about the proposed lighting, she does not believe that the addition of an extra half hour or 45 minutes of court playing time will have a real negative impact on her as a resident living next to the tennis courts. They're already in use a lot of the time during the summer months.

Mrs. Wells noted that the Montgomery County Swim League has one big meet at the pool, potentially every summer. She would support a community liaison committee in our neighborhood if that would be a condition for approval.

2. In Opposition to the Petition:

a. West Montgomery County Citizens Association, by George A. Barnes (Tr. 235-246; 284):

George A. Barnes testified that he is the zoning chair and treasurer of the West Montgomery County Citizens Association (WMCCA), which completely agrees with Technical Staff's recommendation that this application be denied. When inflated, this bubble will be highly visible from the street and neighboring houses; its appearance is decidedly nonresidential and it will dwarf the neighboring houses. It's bulk and commercial nature are incompatible with the surrounding single-family residential community and adds significantly to the impacts which the neighbors of the facility will have to live with.

Tennis courts are not quiet. The sound of balls hitting rackets is surprisingly loud and can carry a significant distance. Voices, particularly at night, can carry a long way. If all the courts were in use at the same time, what started as a simple neighborhood facility with a couple of courts can assume the character of a major nuisance.

WMCCA also disagrees with the position of the Department of Permitting Services that this structure should be treated as a temporary structure for purposes of determining setback requirements from Oaklyn Drive and from any adjoining property. The expanded courts will have a permanent footprint and will surely require some form of wall or seal to which the bubble will be anchored. The housing for the fan which will keep the bubble inflated will be a permanent structure as will the lighting supports.

The bubble itself will be inflated for six months each year and during that entire time, the structure will have the size and bulk of a very large building, quite close to Oaklyn Drive. There is also a right-of-way along the side of the property which deserves setback protection. For the half of every year that the bubble is inflated, it will dominate the view of the swim club and Oaklyn Drive and the perception of every person who drives past in a way which no other structure in the neighborhood would be allowed to do.

WMCCA strongly urges the Hearing Examiner and the Board of Appeals to recognize the actual visual impact of a structure of this size and bulk and require the same setbacks as any building which the club sought to construct on this site under Section 59-G-2.56. The club offers photos of other bubbles near residences but we do not know the circumstances of approval of these examples – what the zoning is and where they're located or whether they predate the residential development. In the case of the example on Potomac Tennis Lane, the bubble predated the only nearby residence and the other uses are Manor Care, a large nursing home, and the Falls Road Golf Course, a County-

owned and operated facility. None of these examples in any way resemble the situation at the Oaklyn Drive site. This bubble will be highly visible to all of the surrounding neighbors.

WMCCA is quite concerned that the club is operating a commercial tennis facility, which is contrary to the intent of the original special exception. The club's bylaws stipulate that the facility is for members only, and it is on that basis that the community has supported their operations in the neighborhood. WMCCA has learned that the club recently amended its bylaws to allow temporary memberships. If so, this opens the way to full commercial walk-in use of a facility as well as allowing use of the courts and tennis lessons to anyone who pays a nominal temporary membership fee, a de facto commercial tennis facility operating under the umbrella of a community swimming pool, perhaps even retail sales of tennis equipment. In WMCCA's view, that would be a violation of the special exception. Section 59-G-2.56 "swimming pools, community" does not mention or seem to permit tennis courts, bubbles, lessons or services of tennis pros. This is not a country club. It is a swimming pool.

In this instance, the Planning Board staff has reached a finding that this proposed tennis bubble does not meet the criteria for approval, and in fact, is in violation of the principle to the Master Plan. [The Hearing Examiner informed the witness that there's a very serious legal question as to whether the master plan applies here because the sections of the code which would ordinarily be used to apply the master plan are specifically excluded by 59-G-2.56. In other words, the master plan comes to the consideration for this by virtue of the language in 59-G-1.21(a), and 59-G-2.56 tells us we can't consider the provisions at 59-G-1.21(a).]

Finally, staff has quite rightly made the determination that this proposal is incompatible with the architecture of the adjoining neighborhood by reason of its bulky character and thus, does not meet the compatibility requirements.

Mr. Barnes mentioned the testimony of immediate neighbors regarding their problems with offsite parking and noise which have become increasingly troublesome over the years. The club has been a fixture in the community and has served it well for many years. WMCCA regrets that this expansion seeks to cross the line between a community-friendly recreational facility and one which will adversely impact the lives of those who must live next to it in a community as a whole. WMCCA believes that this proposal violates the requirement of Section 59-G-2.56, that a community pool may not adversely effect the present character of the surrounding residential community, and is contrary to the guidelines of the master plan. Therefore, the tennis bubble must be denied. WMCCA does not oppose the other requested changes, if the new lights were turned off by 8:00 p.m.

WMCCA's concern about lighting and night play is not when the bubble's inflated. It is during the summer months when the hour of play is extended later in the evening and people may be out on their decks or outside or whatever, and noise carries a lot more at night. That was the concern about lighting and nighttime play. The noise of play issue isn't for when the bubble was up, except for the noise of inflating the bubble.

b. Alurina Lloyd (Tr. 34-45; 271-272):

Alurina Lloyd testified that she lives at 9205 Oaklyn Terrace. She joins her neighbors in asking that the Board deny the Potomac Swim and Recreation Association, Inc.'s request to construct a tennis bubble at it's 10531 Oaklyn Drive facility as the use and enjoyment of her land would be impaired by noise, traffic, trash and light. She is in favor of the dumpster being moved. Her home sits directly across the street approximately 120 feet from the club and is abutted by the Manor Montessori School. She noted that, in Case No. S-173-B, the Montessori School was granted a variance allowing expansion provided that it included, quote, "heavy landscaping to muffle noises." The school planted a row of trees along the edge of the property in accord with the variance guidelines, but most died

during the first year. No new trees have been planted since the first ones at the start of the expansion and today, only three trees remain. Ms. Lloyd cites this as an example of lack of enforcement.

With regard to the Swim Club, Ms. Lloyd stated she will have to deal with the noise generated by the bubble's fan, increased traffic, bouncing balls, after hour parties, sporting machines, et cetera. Over the years, she has had to contact the Montgomery County Police Department regarding the noise level from the club, late night loitering in the club's parking lot and for other reasons. This will inevitably worsen if the club is allowed to operate until 10:00 p.m. and for an additional season.

Ms. Lloyd also felt that her quality of life would be greatly diminished by a myriad of other factors. The club's accompanying request to leave the lights on until 10:00 p.m. will illuminate her property when she is trying to sleep. Excess trash from members and spectators will line the street and will blow onto her property. The swim meets are attended by a large number of spectators as well as members from various swim clubs causing an extremely large number of cars to be parked on both sides of Oaklyn Drive and Oaklyn Terrace periodically blocking two-thirds of her driveway. No-parking signs are consistently ignored. When the meets are held during rainy seasons, the cars park on her property, ruining her lawn. The problem of speeding will be compounded. Heavy traffic to and from the neighborhood late at night compromises neighborhood safety. Later operating hours will unavoidably lead to increased loitering.

Finally, there has been a proliferation of special exceptions and permissions granted on Oaklyn Drive. These include the Potomac Swim and Recreation Association, Manor Montessori School, Hare Krishna Temple, Avenel Country Club, Swim Club at Avenel, Avenel Golf Course, Avenel local park and Connolly School of the Holy Child. In a primarily residential neighborhood, these are unsightly and obtrusive structures. As these venues expand, property value falls.

In Ms. Lloyd's opinion, clubs like the Potomac Swim and Recreation Association were originally permitted as a convenience for the neighborhood. However, the commercialization of the club renders it more of a nuisance than convenience. As evidenced by its website, the club actively seeks members from the District of Columbia and Virginia. It is no longer primarily for the benefit of the County residents.

c. Howard Diener (Tr. 107-120):

Howard Diener testified that he lives at 10605 Oaklyn Drive. When he moved into his home, the pool and club existed, and he did so openly knowing that the children were having a great time and tennis courts were there. It has never been a problem and has never complained about it. He is testifying because of concerns about the proposed bubble and the lighting.

He strongly supports the findings of the Technical Staff and has not seen anything to date that would contradict their findings. The crux of it is the Staff concluded that the planned size of the tennis bubble would not be compatible use of the proposed location. The planned size of the tennis bubble is out of scale with the nearby residential homes. It would clearly be in view of the homes located on the northwest or southeast side of the site. He lives on Lot 11, just outside the northern corner of the site, directly behind the upper courts, near the dumpster, and with a direct line of sight to the proposed bubble and the clubhouse.

His house has less than 10 percent of the footprint and neighborhood houses are lower than a 35-foot high bubble. So there's no question that it is out of sync with the neighborhood, it is completely out of scale with the neighborhood as far as he is concerned. Also, taking all the other improvements that have been made over the years along Oaklyn Drive all together, it starts to become a major impact, and this is just one additional change to the inherent nature of the neighborhood.

Mr. Diener is also very concerned about the proposed lighting, and even if the photometric studies indicate it would not really have a major impact, it does keep the club open until 10 o'clock at night and that those additional hours are a problem because it is noise and it's not swim club noise, it's not little children playing in the pool noise, and it's a different kind of noise. When you have people there until 10 o'clock at night, especially in the summer, it will have an adverse effect. This becomes a different kind of annoyance because it takes that 8 o'clock annoyance up to 10 o'clock so he feels that it is a real problem.

Mr. Diener speculated on the reason for the Petitioner Planning Board's 2-2 split vote, and on what would happen to the Swim Club if the bubble is built and the club fails financially. He also expressed a concern that the tennis bubble would decrease his property value. The majority of people moving in might not want it. The bottom line is that it's just not good for the integrity of the community and it's certainly not good for us being in close proximity. Mr. Diener has no problem with the other proposed changes by the applicant, the outdoor exercise area, moving of the dumpster and the tennis office, so long as its use is not commercial. His objection is to the lighting and to the bubble. The proposed bubble cover is, in his opinion, worse than a white cover – more imposing. He would be okay with the lighting if it went off at 8:00 p.m.

d. Shirley Kahan (Tr. 209-212):

Shirley Kahan testified that she lives at 10621 Oaklyn Drive, on the same side as the Swim Club. She lives four houses in from the corner of Falls Road and Oaklyn Drive and is concerned by the size of the bubble, three-and-a-half stories, near Oaklyn Drive. She feels that having it right to the street like that is really incompatible with the neighborhood. The trees they are planting won't grow in her lifetime to where they're going to obscure that bubble, and they'll never entirely obscure it. When you're close up, it will be there. So she doesn't like the idea of the bubble or the size of the bubble.

Mrs. Kahan observed a lot of deciduous trees badly in need of some pruning. There were large dead limbs, a lot of dead wood on the trees and they weren't being maintained, and she is concerned that that might be the case with the trees on the outside of the tennis bubble.

e. Leonard Kahan (Tr. 212-214):

Leonard Kahan testified that he lives at 10621 Oaklyn Drive. He has lived in that neighborhood for about 26 years, and he certainly had no expectation of having anything as large and obtrusive as a tennis bubble being built in that area. He feels it would be an incompatible use for the neighborhood, and it would be detrimental to their property values.

f. Cheng Ku (Tr. 252-256):

Cheng Ku testified that he lives at 8624 Brickyard Road and intends to move to 10613 Oaklyn Drive, which is two houses northwest from the tennis club. He opposes the tennis bubble and the lighting. He has no problem with the other requests, as long as they take care of the parking issue and the trash issue.

He noted that the tennis courts are 10 feet above street level. So adding another 35 feet, if you're looking from the street, is like 45 feet. Compared with an existing older house, the bubble is "humongous." Mr. Ku challenged the comparison with the Quince Orchard bubble, because nearby Quince Orchard Boulevard is a six lane highway, not like Oaklyn Drive, which is only two lanes. There's a totally different surrounding.

And on Potomac Tennis Lane, the only house was built after the tennis bubble was built, so it's not comparable. Bullis School and the Georgetown Prep are sited on much bigger land areas, probably more than 10 or 20 acres, and also the surrounding houses were built afterwards.

He feels that a “commercial structure” should be only permitted in commercial zone, and this will invite expansion. He also pointed out that this is not supported by any people living on Oaklyn Drive.

g. Elsbeth Backus (Tr. 256-261):

Elsbeth Backus testified that she lives at 10601 Oaklyn Drive, and is opposed to the tennis bubble. She is also opposed to the lighting, the tennis building and the new outdoor exercise area. She is not opposed to moving the dumpster. The dumpster has been eyesore for her because the dumpster is visible from every window in the back of the house. Petitioner has not kept it neat for many years now, and she picks up trash all the time. Other places keep their areas much neater.

Mrs. Backus fears that the planned hollies for screening will not grow.

She has been a member of the pool, and does not complain about the sounds of children at play. However, in the last few years, the swim meets have gotten bigger, and people park on her lawn despite a no parking sign.

h. Jean Ku (Tr. 261-263):

Jean Ku testified that she will be moving back to 10613 Oaklyn Drive in June, two houses down from the swim club. That is where she lived for seven years. She did not complain about the noise from the swimming pool, but she is opposed to the petition because of the effect on the value of her property with the building of this big bubble and the lighting. You will be able to see the bubble. Most of the people testifying in support of this building of the bubble don't live on Oaklyn Drive, and their property value won't be impacted that dramatically. The noise from late night operations, with the lights and with the bubble will be a problem.

Aside from the bubble and the lighting, Mrs. Ku is okay with the other proposed changes.

i. Richard Backus (Tr. 263-271):

Richard Backus testified that he lives at 10601 Oaklyn Drive. He disputed one witness's statement that there are 20,000 square-foot houses in the neighborhood. They run, not counting the basement, but the upper floors in the order of about 4,000 square feet. 18,000 square feet is in fact the footprint of the bubble. Divided by his 2,000 square-foot footprint, that's nine times as large. But the issue is the volume, which for the bubble is about 450,000 cubic feet (18,000 X 25 foot avg. height).

According to Mr. Backus, the volume of his house above ground "is about 4,000 square feet."²³ Some of the people for the pool have testified that the neighbors are for it. If one goes up Oaklyn Drive to Falls Road and about the same distance just beyond the Montessori School, there are 28 neighbors. Mr. Backus testified that he submitted signatures from 24 of those neighbors opposing it, counting by households. Four out of five, who are members of the pool, opposed it on that stretch of roadway. Mr. Backus questioned whether the majority of members approved the bubble.

Mr. Backus is concerned about the impact of the bubble on property values and also the impact on the neighborhood if the Club goes bankrupt. He would like the club to stay the way it is.

Mr. Backus also noted that the special exception modification issued in 1976 required that Petitioner hold no event of any kind where their parking lot does not accommodate it. That's a violation when participants in special events park up and down the street.

C. People's Counsel

Martin Klauber, the People's Counsel, participated in the hearing, but did not call any witnesses. Mr. Klauber stated that his office neither supports nor opposes the modification petition (Tr. 234-235); however, he did recommend that a community liaison council (CLC) be established to promote communication between Petitioner and its neighbors and to help resolve matters of mutual

²³ Actually, it appears that Mr. Backus was conflating issues of area and volume. If his house has a 2,000 square foot footprint, as he testified, and the height is 20 feet on average, then the volume would be 40,000 cubic feet, which divides into the volume of the bubble 11.25 times.

concern. Tr. 21-23. As stated by Mr. Klauber, “Community Liaison Councils have been used by the Board of Appeals in 29 special exception cases. They ensure communications between the special exception holder and the community impacted by the special exception, that those continue for as long as the special exception exists.” This recommendation would apply whether or not the tennis bubble is approved. The terms of the CLC were spelled out by Mr. Klauber (Tr. 21):

I would recommend that a community liaison council be established, to be composed of representatives of the special exception holder, representatives of the streets and/or community surrounding the special exception use, having the People's Counsel as an ex-officio member to facilitate the meetings, having four meetings of that community liaison council each year, having minutes taken of those meetings and having this special exception holder submit an annual report containing those minutes to the Board of Appeals.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met and that it is compatible with the existing neighborhood.²⁴ Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable standards.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c)(4) of the Zoning Ordinance. In Part I.B. of this report, we noted that the modifications proposed by Petitioner would expand floor area of all structures by more than 7,500 square feet, and the proposed tennis bubble would change the nature or character of the special exception to an extent that

²⁴ Usually, the Petitioner must also establish that the use will conform to the applicable master plan. Community Swimming Pool special exceptions do not expressly require such a showing because the section of the zoning ordinance referencing the master plan, §59-G-1.21(a)(3), is made inapplicable pursuant to the terms of §59-G-2.56, as explained elsewhere in this report. Though it could be argued that conformity with the master plan is an inherent requirement of special exception uses, the Hearing Examiner has instead analyzed this case in terms of applicable compatibility requirements.

substantial adverse effects on the surrounding neighborhood could reasonably be expected. Thus, pursuant to Zoning Ordinance §59-G-1.3(c)(4)(A), the Board may require that the underlying special exception be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise and screening requirements of 59-G-1.26. However, if the proposed tennis bubble is not permitted, then the Board need not direct wholesale changes in the landscaping and screening provided. Some additional screening will still be required for the new tennis office building, the new lighting and the relocated dumpster, but these changes would directly relate to the proposed modifications.

Based on the testimony and evidence of record, the Hearing Examiner concludes that, except for the proposed tennis bubble, the changes to the site requested by Petitioner will meet the requirements for this special exception, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. *“Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.”* Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. *“Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.”* *Id.*

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case,

analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a community swimming pool use. Characteristics of the proposed modifications that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed modifications that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff suggests that the inherent characteristics of a community swimming pool include: “(1) vehicular trips to and from the site by members, staff, and visitors to the swimming pool; (2) noise associated with the various activities on the site; (3) lighting, and (4) visual disturbance that would normally be created by operation of a swimming pool.”

Technical Staff found that the following items are non-inherent characteristics of a community swimming pool: “The layout of the site, the size of the membership, the number of swim meets, and additional activities such as basketball, exercise equipment, and outdoor and indoor tennis courts. . .”

Petitioner’s land planner, Alfred Blumberg, agreed with Technical Staff’s listing of inherent characteristics, but disagreed with some of the items they listed as non-inherent characteristics, such as the number of swim meets and the inclusion of tennis courts; however, even Mr. Blumberg conceded that the proposed tennis bubble was non-inherent. Tr. 220-222.

Based on the evidence of record, the Hearing Examiner agrees with Technical Staff’s breakdown of inherent and non-inherent characteristics, except there is no evidence that lighted tennis courts are “necessarily associated” with community swimming pools. As discussed in Part II.C.3. of

this report, Petitioner produced a list of 10 other community swimming pool special exceptions approved by the Board of Appeals, and six of them permitted tennis courts (Exhibit 66(j)); however, Petitioner offered no evidence that tennis court lights are commonly permitted in this type of special exception. The Hearing Examiner therefore concludes that this characteristic is non-inherent for the community swimming pool use.

Of course, this conclusion does not mean that such lighting should be prohibited, and the Hearing Examiner recommends allowing the lighting, with appropriate screening and operational limits, as discussed in Part II.D. of this report. Whether tennis courts and swim meets are considered inherent or non-inherent is actually immaterial in this case because both have been permitted previously by the Board. Moreover, as provided in Code § 59-G-1.2.1, “*Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.*” Therefore, all of these factors must be considered together in determining the adverse impacts on the neighborhood.

Technical Staff evaluated those impacts, as follows (Exhibit 23, pp. 10-11):

The location of the 4.8 acre property is in a neighborhood of one-family detached homes. As such, the impacts of the additional improvements must be analyzed to determine whether the effects are acceptable or would create adverse impacts sufficient to result in denial. The light fixtures associated with the tennis courts are designed to not have any spillover into the neighboring properties. The lights, although not desirable in a residential area, will not adversely impact the neighborhood. The proposed light fixtures in the tennis court area are equipped with shields, which direct the light down toward the ground and not outward. The photometric plan indicates that the lights on the property in the summer months will not exceed 0.1 footcandles at the property line.

The additional tennis court, exercise equipment, and support office are not likely to result in any unacceptable noise related problems, traffic disruption, or environmental impacts. However, the addition of a tennis bubble would not be a compatible use at the proposed location. The planned size of the tennis bubble is out of scale with the nearby residential homes. It would clearly be in view of the homes located to the northwest and southeast sides of the site. The majority of the landscaping is provided by tall, shade trees, which lose leaves during the winter season when the bubble will be inflated, increasing the

visibility of the structure. Although the applicant is proposing a green canvas-type bubble, there is not sufficient buffering to mitigate visual impacts on nearby properties. Staff finds that the adverse impacts of the proposed tennis bubble are non-inherent and a sufficient basis to deny the modification application.

Based on the entire record, and for the reasons discussed at length in Part II. D. of this report, the Hearing Examiner agrees with Technical Staff's analysis in this regard, except that the Hearing Examiner would not deny the entire application, but rather just the offending tennis bubble. Other issues can be handled effectively with the conditions proposed in Part V of this report.

B. General Standards

Most of the general standards for a special exception are found in Section 59-G-1.21(a); however, pursuant to §59-G-2.56, the General Standards as set forth in §1.21(a) do not apply to Community Swimming Pools. Other general standards do apply, as discussed below and, at greater length, in Part I.B. of this report.

Because evaluation of the Master Plan is incorporated into the General Standards contained in §1.21(a), and those standards do not apply in this case, the Hearing Examiner will not base his recommendation upon the guidelines contained in the Master Plan which applies to this region, the 2002 Potomac Subregion Master Plan. Nevertheless, it should be noted that Petitioner's own land planner, Alfred Blumberg, acknowledged that the Master Plan's guidelines regarding special exceptions call for protecting residential areas and established neighborhoods, and for maintaining compatibility with the architecture of the adjoining neighborhood. Exhibit 70(a).

Citing the same two factors, Community-Based Planning Staff found that the proposed tennis bubble would be inconsistent with Master Plan guidelines, based on incompatible bulk and scale. Staff felt the tennis bubble "would dwarf the nearest residential dwelling, which is directly southeast and approximately 192-feet from the proposed bubble." Exhibit 23, p. 4. Staff also observed that

the additional activity, lighting, and noise from a generator to maintain air in the bubble, would be contrary to Master Plan guidelines intended to limit the impact of special exceptions in established neighborhoods.

These observations actually apply with equal force to requirements in the Zoning Ordinance that are applicable to this case. Thus, the decision not to rely on the Master Plan in this case will have no impact upon the final outcome. The same concepts relating to compatibility suggested in the Master Plan are also contained in Zoning Ordinance §§59-G-1.23(g) and 1.26. Both of those sections are applicable here, and it is those sections upon which the Hearing Examiner relies in evaluating compatibility in this case, not the Master Plan.

C. Specific Standards: Community Swimming Pools.

The specific standards for a community swimming pool are found in Zoning Ordinance § 59-G-2.56. The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the proposed modifications, except for the proposed tennis bubble, would be consistent with these specific standards, as outlined below.

Sec. 59-G-2.56. Swimming pools, community

The provisions of subsection 59-G-1.21(a) do not apply to this section. In any zone, a community swimming pool may be allowed provided that such use of land will conform to the following minimum requirements:

(a) The swimming pool, including the apron and any buildings, must not at any point be closer than 75 feet from the nearest property line nor closer than 125 feet from any existing single-family or two-family dwelling; provided, that where the lot upon which it is located abuts a railroad right-of-way, publicly owned land or land in a commercial or industrial zone such pool may be constructed not less than 25 feet at any point from such railroad right-of-way, publicly owned land or commercial or industrial zone. Any buildings erected on the site of any such pool must comply with the yard requirements of the zone in which the pool is located.

Conclusion: As discussed in Part II.C.2. of this report, the additional setbacks required by §59-2.56(a) for buildings do not apply to the proposed tennis bubble. They do apply to the proposed tennis office building, and it will conform to those standards. Since there is no proposal to modify the swimming pool, its apron or other buildings on the site, their setbacks are not considered herein.

(b) A public water supply must be available and must be used for the pool or use of a private supply of water for the pool will not have an adverse affect on the water supply of the community.

Conclusion: Technical Staff notes that the water supply is not an issue in this case, as there is no request to increase the pool size or demand of the pool on the water system. Exhibit 23, p. 9. The Hearing Examiner agrees.

(c) When the lot on which any such pool is located abuts the rear or side lot line of, or is across the street from, any land in a residential zone, other than publicly owned land, a wall, fence or shrubbery must be erected or planted so as to substantially screen such pool from view from the nearest property of such land in a residential zone.

Conclusion: As stated in the Technical Staff report, because the swimming pool itself has been previously approved and is not changing, the issue of screening with respect to the pool should not be re-evaluated. “However, there is not sufficient planting, nor screening of any type, that would reasonably shield the visual impact of the tennis bubble.” Exhibit 23, p. 9. The Hearing Examiner agrees and so finds. The additional landscaping proposed by Petitioner after the Technical Staff report was issued will help, but it is still not sufficient to screen a structure of the size and bulk of the proposed tennis bubble, as discussed at length in Part II. D. of his report.

(d) *The following additional requirements must also be met: Special conditions deemed necessary to safeguard the general community interest and welfare, such as provisions for off-street parking, additional fencing or planting or other landscaping, additional setback from property lines, location and arrangement of lighting, compliance with County noise standards and other reasonable requirements, including a showing of financial responsibility by the applicant, may be required by the Board as requisite to the grant of a special exception. Financial responsibility must not be construed to mean a showing of a 100 percent cash position at the time of application but is construed to mean at least 60 percent.*

Conclusion: Technical Staff stated that it has “no issue with the parking, fencing, setbacks, and lighting as set forth in the site plan. However, there is a concern with the bulk and size of the proposed tennis bubble . . .,” and it found the proposed landscaping to be inadequate. Exhibit 23, pp. 9-10. As stated previously, the Hearing Examiner agrees.

As to noise, the Hearing Examiner accepts the noise study submitted by Petitioner after the hearing (Exhibit 66(b)), which indicates that if the bubble is approved, noise levels will remain within County standards at the property lines. If the Board adopts the Hearing Examiner’s recommendation that the bubble not be approved, then, of course, the issue of noise from this equipment will be moot. Noise from swim meets is not before the hearing examiner because the modification petition does not pertain to swimming activities.

The Hearing Examiner also agrees with Technical Staff that Petitioner is not required to demonstrate financial responsibility because the swim club is an ongoing operation under an existing special exception, and there is no evidence that the proposed modifications would adversely impact the financial responsibility of the swim club.

D. Additional Applicable Standards

59-G § 1.23. General development standards

- (a) **Development Standards.** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The following Table from Technical Staff Report (Exhibit 23, p. 6) demonstrates compliance with all development standards:

Table 2: Applicable Development Standards of the R-200 Zone.

Development Standards	Requirement	Provided	
<i>Lot Area (59-G-2.31(1))</i>	20,000 sf	208,216.8 sf (4.78 ac)	
<i>Lot Width (§59-C-1.322(b)):</i> @ Front of Bldg Line @ Street	100 ft 25 ft	±478 ft ±478 ft	
<i>Yard (Setback) Requirements (§59-G-2.56(a))</i> §59-C-1.326 <i>Yard Requirements for an accessory building or Structure</i> (a) <i>From Street: 65 ft</i> (b) <i>From a rear yard: 7 ft</i> (c) <i>From a side lot line: 12 ft</i>	75 feet from the nearest property line nor closer than 125 feet from any existing single-family or two-family dwelling provided, that where the lot upon which it is located abuts a railroad right-of-way, publicly owned land or land in a commercial or industrial zone, such pool may be constructed no less than 25 feet at any point from such railroad right-of-way, publicly owned land or commercial or industrial zone	Office >75 ft >125 ft	Tennis bubble 12 ft >125 ft
	Any buildings erected on the site of any such pool must comply with the yard requirements of the zone in which the pool is located.	±81 ft ±280 ft ±179 ft	N/A.
<i>Building Height (maximum) (§59-G-2.31(6))</i>	50 ft	Office ±16 ft	Bubble 35 ft (@ peak)
<i>Coverage (maximum net lot area) (§59-C-1.328)</i>	25%	1.8%	

- (b) ***Parking requirements.*** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: The present on-site parking was previously approved by the Board. The changes proposed by Petitioner will not create any demand for additional parking spaces because the additional tennis activates (tennis in a bubble in winter and under the lights during the rest of the year) would occur when the pool is either not in use or little used. Therefore, no additional spaces would be required if this modification petition were granted; however, people parking on the street and on private property during special events is a concern which was discussed in Part II. D. of this report, and is the subject of a recommended condition in Part V of this report.

- (c) ***Minimum frontage.*** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
 - (2) *Sand, gravel or clay pits, rock or stone quarries.*
 - (3) *Sawmill.*
 - (4) *Cemetery, animal.*
 - (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
 - (6) *Riding stables.*
 - (7) *Helipport and helistop.*

Conclusion: As indicated in the above Table, the subject site meets minimum frontage requirements.

- (d) ***Forest conservation.*** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: The Hearing Examiner finds that the subject site is governed by an approved forest conservation plan, as discussed in Part II. C. 9 of this report.

- (e) ***Water quality plan.*** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: This provision is not applicable because the subject site is not located in a special protection area; however, as noted in Part II. C. 9 of this report, Petitioner did file a stormwater management concept plan (Exhibit 9), which has been approved by Department of Permitting Services. Tr. 153, 170.

- (f) ***Signs.*** *The display of a sign must comply with Article 59-F.*

Conclusion: No new signs are proposed.

- (g) ***Building compatibility in residential zones.*** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: The compatibility of the proposed structures with their surroundings is discussed at length in Part II. D. 1. of this report. The Hearing Examiner concludes, as did Technical Staff, that a tennis bubble of this bulk, located so close to the property line and to the surrounding single-family homes, would not be compatible with this quiet residential neighborhood. The proposed tennis office building would be compatible, and the proposed lighting, though not ideal in a residential neighborhood, would be compatible, as conditioned.

- (h) ***Lighting in residential zones.*** All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

- (1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.
- (2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.

Conclusion: As mentioned previously, the proposed lights would not result in lighting in excess of 0.1 footcandles at the side and rear property lines, nor will it allow direct lighting to improperly intrude into adjacent residential properties.

59-G-1.24. Neighborhood need.

In addition to the findings and requirements of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:

* * *

- (5) Swimming pool, community.

* * *

Conclusion: Evidence of community need is not at issue here because the swim club was long ago approved by the Board.

59-G-1.25. County need.

In addition to the findings of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:

Conclusion: There is no County need requirement for community swimming pools.

59-G-1.26. Exterior appearance in residential zones.

A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.

Conclusion: The compatibility of the proposed structures with their surroundings is discussed at length in Part II. D. 1. of this report. The Hearing Examiner concludes, as did Technical Staff, that a tennis bubble of this bulk, located so close to the property line and to the surrounding single-family homes, would not be compatible with this quiet residential neighborhood. The proposed tennis office building would be compatible, and the proposed lighting, though not ideal in a residential neighborhood, would be compatible, as conditioned.

Based on the testimony and evidence of record, I conclude that, except for the proposed tennis bubble, the changes proposed by Petitioner, as conditioned in Part V of this report, will meet the applicable requirements for the proposed use. The request to approve a tennis bubble should be denied.

V. RECOMMENDATION

Based on the foregoing analysis and a thorough review of the entire record, I recommend that Petition No. CBA-864-B for modification of the existing special exception to allow changes to the facilities, staff and hours, be GRANTED in part and DENIED in part. Specifically, I recommend that the request to add a tennis court cover (*i.e.*, the tennis bubble) and related equipment be DENIED, and that all other changes to the physical facilities be permitted, with the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. All terms and conditions of the approved special exception remain in full force and effect, except as modified in the Board's order granting portions of this modification request.
3. Petitioner must comply with the conditions of the final stormwater management plan approved by the Montgomery County Department of Permitting Services.
4. Petitioner must comply with the terms of the Final Forest Conservation Plan approved June 2, 2008. Exhibits 7(b)-(d).
5. The maximum allowable number of employees and contract staff will remain unchanged.
6. Total membership in the Potomac Swim Club continues to be limited to 400 member families, including both permanent and temporary membership. Use of the Club is restricted to members and their guests who pay a guest fee.
7. Club hours of operation are between 6:30 a.m. and 9:00 p.m. All external lights must be on a timer set to turn off by 9:00 p.m., and all on-site club activity must cease at that point.
8. Petitioner must inform all members in writing that all those who travel to the subject site by motor vehicle may park only in Petitioner's parking facility, as required by this Board's resolution dated February 26, 1975 (Exhibit 12(d)). Petitioner must establish a system for self-enforcement of this requirement after reviewing the issue with the community liaison council. At the very least, this enforcement scheme must provide that members must submit their vehicle tag numbers to Petitioner, and Petitioner must establish a penalty scheme for violators, including expulsion from the Swim Club for the second violation. Petitioner must post a telephone number to report violations on the Club's website, and must appoint a parking coordinator to receive reports of violations and enforce the parking rules. Neighbors may also

report violations directly to the Department of Permitting Services for enforcement of the special exception.

9. Petitioner must take steps to ensure that the site is maintained free of loose trash and other unsightly conditions.
10. Petitioner must not allow the new tennis office building or other on-site facilities to be used for the sale of merchandise.
11. Petitioner must establish a community liaison council (CLC) composed of representatives of the special exception holder; civic associations representing the general neighborhood surrounding the special exception use; neighbors who choose to attend; and the People's Counsel, who acts as an ex-officio member to facilitate the meetings. There must be four meetings of the community liaison council scheduled each year; with minutes taken of those meetings; and with an annual report containing those minutes submitted by Petitioner to the Board of Appeals.
12. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: June 1, 2009

Respectfully submitted,

Martin L. Grossman
Hearing Examiner